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Supreme Court of the United States

OCTOBER TERM, A. D. 1896.

Albert L. France, Benjamin Hollen, George Williams, James Sanderline, Nat. Hyams, John Rothenstein, George Bickles, Maurice Richmond, and Charles W. Reilly,
Plaintiffs in Error,

VS.

The United States,
Defendant in Error.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF OHIO.

BRIEF FOR PLAINTIFFS IN ERROR.

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THE OHIO VALLEY PRINT, CIN.

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STATEMENT OF CASE.

Plaintiffs in error, who were defendants below, were convicted at the February term 1896 of the District Court of the United States within and for the Southern District of Ohio and Western Division, of violating Section 5440 of the Revised Statutes of the United States, viz., "of conspiring to commit an offense against the United States." The overt act which they were charged and convicted of having conspired to commit, was in causing to be carried from one State to another, to wit, from Covington, in the State of Kentucky, to Cincinnati, in the State of Ohio, a number of papers, instruments or certificates giving the result of a lottery which had been drawn in the city of Covington, Kentucky, claimed to be in violation of Section 1 of an act passed March 2, 1895, vol. 28, United States Statutes at Large, page 963. Each of the plaintiffs in error was fined in the sum of $1,000, and upon all of them sentences of imprisonment, as to six, in various county jails, for twelve months each, and as to three, in the Ohio Penitentiary for periods of 13, 14 and 15 months respectively, as will appear by the record in the case. The indictment beginning at page 1 of the record sets out in various counts, all practically of the same tenor, though pleaded in different forms, that the said defendants "did then and there unlawfully, knowingly and feloniously conspire together to commit an offense against the United States, to wit, to cause to be carried from one State to another in the United States, to wit, from Covington, in the State of Kentucky, to Cincinnati, in the State of Ohio, a large number, to wit, 132 papers, certificates and instruments in the words and figures following, to wit: "K—521—95" (then follows a series of numbers); "H—571—95" (followed by a series of numbers); "which said papers, certificates and instruments and the letters and figures (repeating the numbers) then and there represented that at the 521st drawing of the Kentucky Lottery, in the year 1895, the twelve numbers (giving the numbers) had been drawn and selected by lot and chance, as aforesaid, and the letters and figures 'H' (with numbers following) then and there represented that at the 571st drawing of the Henry Lottery, in the year 1895, the twelve numbers (giving the numbers) had been drawn and selected by lot and chance as aforesaid, as they, the said defendants, then and there well knew." The indictment and proof showing that the papers or certificates which had been carried from Covington, Kentucky, to Cincinnati, Ohio, as aforesaid, represented the result of drawings which had been held in Covington, one in the Kentucky Lottery and one in the Henry Lottery, and were printed statements of the result of such drawings. (See testimony of E. D. Seeley, one of the witnesses for the Government, commencing at top of page 110 (folios 205 and 206) of the Record, in which he says:

"A. This is one of the official prints that we always got back morning and afternoon, representing the numbers drawn in the 'H' and 'K' Lottery. 'K' is on the top and 'H' is underneath.

"Q. Now, just explain what those mean?

"A. Well, this top row is the numbers as they are taken out of the wheel—62, 19, 57, 12, 15, 10, 8, 52, 68, 76, 7, 61. Now, that is on the top row, and that is the way they are drawn out of the wheel. Then below they come 7, 8, 10, 12, 15, 19, 52, 57, 61, 62, 68, 76 in their regular order.

"Q. What does the 'K' stand for?

"A. That is supposed to be 'Kentucky.'"

The offense against the United States with which the defendants were charged and convicted of conspiring to commit as stated, viz., Section 1 of the act passed March 2, 1895, known as Chapter 191 and entitled "An act for the suppression of lottery traffic through national and interstate commerce and the postal service, subject to the jurisdiction and laws of the United States," is as follows:

"That any person who shall cause to be brought within the United States from abroad, for the purpose of disposing of the same, or deposited in or carried by the mails of the United States, or carried from one State to another in the United States, any paper, certificate or instrument purporting to be or represent a ticket, chance, share or interest in or dependent upon the event of a lottery, so-called gift concert, or similar enterprise, offering prizes dependent upon lot or chance, or shall cause any advertisement of such lottery, so-called gift concert, or similar enterprise, offering prizes dependent upon lot or chance, to be brought into the United States, or deposited in or carried by the mails of the United States, or transferred from one State to another in the same, shall be punishable in the first offense by imprisonment for not more than two years or by a fine of not more than one thousand dollars, or both, and in the second and after offenses by such imprisonment only."

So far as said act is essential to this case and stripped of such parts as do not bear upon it, it reads:

"Any person who shall cause to be brought within the United States from abroad, for the purpose of disposing of the same, or carried from one State to another in the United States, any paper, certificate or instrument purporting to be or represent a ticket, chance, share or interest in or dependent upon the event of a lottery, so-called gift concert, or similar enterprise, offering prizes dependent upon lot or chance," etc.

It will be borne in mind that the papers, instruments or certificates upon which the indictment was predicated were what were commonly known as official prints giving the result of drawings held in Covington as already stated, the papers in question having been found upon the person of Joseph C. Wagner, Robert W. Irvine and John Edgar, who were subpœnæd to appear forthwith before the grand jury then in session, to testify, and there, for the first time, produced the papers in question, which were identified and left with the district attorney and used as evidence in the trial of the case, defendants having all been tried jointly, but the three persons named, viz., Wagner, Irvine and Edgar, not being included in the indictment.

Plaintiffs in error seek a reversal of the judgment of the said District Court upon the grounds set forth in their assignments of error, and we shall now, in as brief a manner as possible, treat the several questions raised by the record upon which we rely for a reversal.

The proof tended to show that one of the plaintiffs in error, Albert L. France, who resided in Covington, was connected with the lottery business prior to the passage of the act of March 2d, 1895, and that Benjamin Hollen acted as a clerk for him in the operation of what was termed the "H." and "K." lotteries—or Henry and Kentucky lotteries. The only proof upon which this is based was the testimony of Seely that he had worked for France when he (Seely) was a policy writer in Cincinnati long prior to the time mentioned in the indictment—and that the plaintiff in error, Maurice Richmond, was "manager" in Cincinnati. As to the remaining plaintiffs in error, namely, Williams, Sanderline, Hyams, Rothenstein, Bickles and Reily, there was testimony that they in different parts of the city of Cincinnati operated what were called "policy" shops, and the only testimony as to any conspiracy charged in the indictment, was the testimony of certain witnesses that they had on several occasions followed the witnesses Irvine, Wagner and Edgar, who were called "runners," from the office of A. L. France in Covington to several of the so-called policy dealers in Cincinnati, and to some of them deliver what appeared to be sealed packages. The conviction, therefore, we claim, as to a conspiracy, was based upon the circumstantial proof that France and Hollen were in the lottery business in Covington, Kentucky; that Williams, Sanderline, Hyams, Rothenstein, Bickles and Reilly were in the "policy" business in Cincinnati and that Richmond was "looked upon" as "manager" in Cincinnati, and that the witnesses, Irvine, Wagner and Edgar, had been traced on several occasions coming from the office of France and going to the offices of the other defendants (except Richmond) and delivering to some of them sealed packages which were supposed to contain printed drawings.

The questions involved and raised by the record are:

1. As to the admission of certain testimony by which these matters were sought to be proved, and to which attention and reference will be made hereafter.

2. To the motion to rule out certain testimony offered by the Government during the trial, and which we claim was improperly admitted.

3. To the error of the court in sentencing two of the witnesses for the Government, namely, Irvine and Wagner, in the presence of the jury for contempt, in refusing to answer certain questions which they claimed as privileged, on the ground that the answers thereto might incriminate them, to the prejudice of the defendants.

4. To the error of the court in overruling the motion at the conclusion of the Government's case to direct the jury to find for the defendants.

5. To the refusal of the court to give certain specia charges asked by the defendants and in modifying certain other charges asked by the defendants, and for errors in certain charges given by the court.

6. In overruling the motion of the defendants in arrest of judgment and for a new trial.

All of which are specifically set out in the assignments of error hereinafter following, and particularly pointed out in the argument referring to the several assignments of error in detail, and to the testimony upon which such assignments are based.

ASSIGNMENTS OF ERROR.

The following are the assignments of error relied upon in the Record (beginning with page 316 to 321, inclusive of the Record), to wit:

4. Defendants further assign as error the action of the court in overruling the motion of the defendants, to strike out the answer of the witness, E. B. Seeley, to the effect that Albert L. France was running a policy business in the year 1895, and excepted to by the defendants.

5. Defendants further assign as error the action of the court in overruling the objection of the defendants to the question put to said Seeley, "State what was the business in which you were working for Mr. France," and to the answer thereto, to the effect that the witness was writing out a policy book, and in overruling the defendants' objection to the question "Please explain what that is," and in overruling the motion of defendants to strike out the answer of the witness to the effect that the witness sat in his office and players came in and gave to witness the numbers they wished to play, paid the amount of money they wished to put on the numbers, and said numbers were put down upon a tissue-paper sheet arranged for copying, and that thereafter a carrier came and took it over to the main office, and at a later time the carrier came back, and if any person had won any money, it was in an envelope, and when the person so having won said money came in and demanded it they paid him.

6. Defendants further assign as error the action of the court in overruling the objection of the defendants to the question, "Who was manager on this side?" to which witness answered, "Morris J. Richmond."

7. Defendants further assign as error the action of the court in overruling the objection of the defendants to the question, "What did he direct you to do? State what it was he directed you to do;" to which witness replied that Richmond selected the places for offices and was the manager.

8. Defendants further assign as error the action of the court in overruling the objection of the defendants and their motion to strike out the answer to the question what other policy shops there were in the city of Cincinnati, the statement by the witness that George Williams wrote in an office at John and Third streets, and that Mr. Vicker had an office at 236 Third street, and that they were all over the city, in nearly every street in town.

9. Defendants further assign as error the action of the court in overruling the objection to the statement made by the witness that "H" and "K" are different policy books run by

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9. Defendants further assign as error the action of the court in overruling the objection to the statement made by the witness that "H" and "K" are different policy books run by

the same persons, and in overruling the motion to rule out the said testimony.

10. Defendants further assign as error the action of the court in overruling the objection to the testimony of the same witness that a certain paper shown to the witness was one of the official prints; that they (meaning witness and others) always got back morning and evening, representing numbers drawn in the "H" and "K" lottery, and explaining that the top row of numbers *as* taken out of the wheel and the lower row of numbers have a numerical order, and that "K" is on top and "H" underneath, and that "K" means Kentucky, and that 521 on said paper is the class number or number of the drawing, and that the class numbers change daily, morning and afternoon, and that this was a morning sheet, and that "95" on said paper is for the year, and the "H" on said paper means "Henry" or "Henrietta," and that those two are different books run by the same people.

11. Defendants further assign as error the action of the court in overruling the objection of the defendants to the question, "This represents a bet, does it?" and the answer of the witness to the effect that it did, and to the admission in evidence of said alleged bet, being Exhibit A in the testimony of Seeley.

12. Defendants further assign as error the action of the court in overruling the objection of defendants to the testimony of H. V. Tolle, one of the grand jurors of the District Court of the United States, in the month of October, 1895, to the effect that the three witnesses, Wagner, Edgar and Irvine, were before said grand jury as witnesses in the October term, 1895, of the District Court of the United States.

13. Defendants further assign as error the action of the court in overruling the objection to the question put to said witness whether at said time said witness, Wagner produced before the grand jury any papers; to which said witness replied that he did.

14. Defendants further assign as error the action of the court in overruling the objection of defendants to the question from what part of his person said Wagner produced such papers; to which witness replied that he produced them from the leg of his sock.

15. Defendants further assign as error the action of the court in permitting the witness to reply, in answer to a ques-

tion by the United States, to the effect that the witness Tolle saw Wagner sign his name to a paper similar to a paper shown the witness at the time.

16. Defendants further assign as error the action of the court in overruling the objection of the defendants to the question put to said witness, Tolle, How many such papers were produced by said Wagner before the grand jury? and in permitting said witness to reply thereto that he did not recollect the number, but there were a good many, but that said Wagner signed his name on only one of them.

17. Defendants further assign as error the action of the court in permitting the witness Tolle, in response to questions objected to by the defendants, to state that there were approximately twenty-five or thirty such papers.

18. Defendants further assign as error the action of the court in permitting the witness Tolle, in response to a question put to said witness at the time and objected to by counsel for defendants at the time, that he thought said Wagner kept the others of said papers except the one upon which he wrote his name himself.

19. Defendants further assign as error the action of the court in permitting said witness, Tolle, in answer to a question objected to at the time by defendants, to state that said witness, Edgar, before said grand jury produced some papers.

20. Defendants further assign as error the action of the court in permitting said Tolle, in reply to questions objected to at the time by defendants, to state that he, said Tolle, saw said Edgar sign his name to a paper like the one shown said Tolle in the presence of the grand jury, although he, said Tolle, could not swear that the writing on said paper was the signature of said Edgar.

21. Defendants further assign as error the action of the court in permitting said Tolle, in reply to a question objected to at the time by defendants, to answer that said Edgar had forty-one such papers.

22. Defendants further assign as error the action of the court in permitting said Tolle to testify, in response to a question objected to by defendants at the time, to the effect that Irvine at such time produced papers.

23. Defendants further assign as error the action of the court in permitting said Tolle to testify, in response to questions objected to by defendants at the time, to the effect that

said Irvine wrote his name on the back of a paper similar to paper shown witness at the time.

24. Defendants further assign as error the action of the court in permitting the said witness, Tolle, to answer, in reply to questions objected to at the time by defendants, to the effect that said Wagner, Edgar and Irvine had money wrapped in paper.

25. Defendants further assign as error the action of the said court in overruling the motion, at the close of the testimony of said witness, Tolle, to rule out all of the testimony of said witness with reference to what took place before the grand jury in the grand-jury room.

26. Defendants further assign as error the action of the court in permitting the witness Carrigan, in response to questions asked him by plaintiffs, objected to at the time by defendants, to testify to the effect that the three witnesses Wagner, Irvine and Edgar were present before the grand jury in October, 1895, of which grand jury said Carrigan was a member, and that at said time said Wagner produced from his person certain papers, the same being taken from the sock of his right foot, and that a certain paper shown witness was one of such papers, and that two of such persons wrote their signatures on the back of such papers, and that said Wagner produced a number of such papers, the exact number witness being unable to state, and that said Wagner produced at the time an envelope containing some money and perhaps some yellow paper, and that said witness, Edgar, was the first witness who testified before the grand jury at such time, and that he produced some papers from his pocket, and that a certain paper shown witness was a paper produced by Edgar, and that the writing thereon was the signature of said Edgar, which said witness saw said Edgar write, and that said Edgar produced several other papers to a number which witness was unable to state, and that said Irvine testified before the grand jury at said time.

And in refusing to rule out all of said testimony on motion of defendants.

27. Defendants further assign as error the action of the court in permitting the witness Hunter to testify, in response to questions objected to at the time by defendants, that he was a member of the grand jury at the October, 1895, term of the United States Court, and that the witnesses Irvine, Edgar and

Wagner were before such grand jury as witnesses, and that said Irvine, Edgar and Wagner at said time produced certain papers before the grand jury and at least one of them produced some money in a package, and that said Irvine, Edgar and Wagner counted the papers over very carefully and put the number down on one of them or a paper like it and then put the date, October 4, 1895, and then signed their names in the presence of said Hunter, and that papers shown witness Hunter at the time were like the papers produced by said Irvine, Edgar and Wagner before the grand jury, and that the numbers written on said papers were the numbers produced by said witnesses, and that each of the witnesses Irvine, Edgar and Wagner signed one of the papers which he gave up, and in overruling the motion of the defendants to rule out all of said testimony.

28. Defendants further assign as error the action of the court in overruling the objection of defendants to the admission in evidence of the papers marked Exhibits G, H and I respectively, being the same papers with respect to which said grand jurors have testified.

29. Defendants further assign as error the action of the court in permitting the witness Charles T. Greve, assistant district attorney, to testify, in response to questions objected to at the time by defendants, to the effect that he was present in the grand-jury room on the fourth of October, 1895, and that the three papers, Exhibits G, H and I respectively, were produced with others by Edgar, Irvine and Wagner and had been in the possession of said Greve ever since, and that said witnesses, Irvine, Edgar and Wagner, wrote their names on the backs of said papers in the presence of him, said Greve, and that said Wagner at said time produced a package containing money and a piece of paper on which certain characters were written, of which said Greve made a copy and returned the original with the money to said Wagner, and that there was evidence tending to prove that one of the witnesses took the papers from his stocking, and that the others got the papers out of their pockets, as witnesses thought, and that the copy of said paper was produced by said Greve and was by said court allowed to be used as evidence, over defendants' objection, and in overruling the motion of defendants to rule out all of said testimony as to what took place before the grand jury.

30. Defendants further assign as error the action of the court in permitting the witness Wappenstein, in answer to

questions objected to by the defendants, to testify that at a previous time (being a detective officer of the city of Cincinnati) — arrested said Irvine and Wagner at the suspension bridge, and that he found upon them packages of money and slips of paper with the numbers on, said slips being similar to Exhibit E, in April, 1895, and in overruling the motion of defendants to exclude said testimony.

31. Defendants further assign as error the action of the court in permitting Edward C. Hill, lieutenant of police in the city of Cincinnati, to testify, in response to questions objected to by defendants, that Wagner, Vickers and Irvine were brought into the police headquarters by officers Wappenstein and Bulmer, and that witness was present when said Wagner, Vickers and Irvine were searched, and that they found on Wagner eight packages, each package containing a sheet of yellow paper with a sum of money, and on Irvine were found eight packages of the same description, and in permitting the witness to state the amount of money found in said envelopes and the character of the paper found, the same being April 25th, 1895, and to the action of the court in overruling the motion of defendants to rule out all of said testimony.

32. Defendants further assign as error the action of the court in overruling the objection of the defendants to the question, "Now, Mr. Seeley, I want you to make out a book, a book in which you enter that bet," and the action of the court in overruling the objection of the defendants to the offering in evidence of the said book, marked Exhibit B, to Seeley's testimony.

34. Defendants further assign as error the action of the court in overruling the motion on behalf of the defendants that the court direct the jury to acquit the defendants.

35. Defendants further assign as error the action of the court in overruling the motion on behalf of defendants to strike out the testimony of the witness F. W. King to the effect that one Richard B. France, one Henry Mitchell and one John Spiller, with other persons, not defendants herein, engaged in drawing lottery numbers at the building at the corner of Fifth and Madison streets, in the city of Covington, Kentucky, and that witness by means of a speaking tube heard numbers being called out, and that they corresponded with the numbers on certain slips which he had seen at butchers' shops and other places.

37. Defendants further assign as error the action of the court in charging the jury as follows:

"For the purposes of this case this section should be constructed as if it read as follows: 'That the person who shall cause to be carried from one State to another in the United States any paper, certificate, or instrument purporting to be or to represent a ticket, chance, share, or interest in or dependent upon the event of a lottery, so-called gift concert, or similar enterprise offering prizes dependent upon lot or chance,' shall be punished as provided in the act."

"Now, to put this section and the act defining and punishing conspiracy together for the purpose of this case they amount to this—that is to say: If the defendants or two or more of them did conspire to cause to be carried from Covington, in the State of Kentucky, to Cincinnati, in the State of Ohio, the papers, certificates and instruments described and charged in the indictment, and any one or more of them did any act in Hamilton county, Ohio, to effect the object of the conspiracy, all who were parties to the conspiracy are guilty as charged. To make this more precise and exact it should be, if any one or more of them did any one of the acts charged in the indictment as having been done in the furtherance of the scheme, all the defendants are guilty as charged."

40. Defendants further assign as error the action of the court in charging the jury as follows:

"Then, much has been said of the witnesses in this case that witnesses have been impeached, and there has been testimony that one or perhaps two witnesses—I don't remember—were not worthy to be believed under oath; that is legitimate criticism, gentlemen, and the proper weight should be given to it, but no more than the proper weight. If it appears that a man, that a witness, be of notoriously bad reputation for truth and veracity, why, it is only common sense that jurors will no be inclined to give to that witness the credit which they would give to a witness of unstained character; but you are not bound to reject his testimony nor are you bound to accept it. It does not destroy his testimony necessarily. It only goes to his credit or credibility with the jury. The jury nevtheless are to determine."

42. Defendants further assign as error the action of the court in giving the special charge and modifying the same as follows:

"I have here some special charges that have been asked: 'A criminal conspiracy consists not merely in the intention of two or more to do an unlawful act, but the gist of the offense is the mutual agreement of the two or more to do the unlawful act in the manner and by the means set forth in the indictment.' That I give with the understanding that the word 'agreement' is to be construed and understood as has already been given you in the charge."

43. Defendants further assign as error the action of the court in modifying the special charge asked by defendant in the manner following:

"The fact that the defendants may each or all of them have been engaged in the policy business does not of itself warrant the jury finding them guilty as charged, for if the jury find that each acted for himself—that is, without an agreement or confederation—to do the unlawful act with the other, then I charge you under this indictment your verdict must be not guilty." That is asked. "I give it with this qualification, that you must take the expression 'without an agreement or confederation' in the sense already given in this charge. It is not necessary to show that they ever saw each other. If the testimony shows a concert of action in carrying out the purpose charged in the indictment, that, as I have already explained, will sustain the charge."

44. Defendants further assign as error the action of the court in modifying the special charge asked by the defendants in the manner following:

"It is not necessary that the participation should be by one who was in the conspiracy at the outset. When once the conspiracy is entered upon, then, so long as it continues, the act of any conspirator in furtherance of it is the act of all. Here is a proposition asked: 'The jury can presume no material fact to exist unless it is fairly taken from the evidence adduced.' I don't like the word 'presume.' The jury can infer no material fact unless it can be taken from the evidence adduced. That is true. In ninety-nine cases out of a thousand where conspiracy is charged it must be inferred from the other facts proven—that is, from the facts taken altogether, not one by one. They are to be taken like a cable, which is made up from the separate strands of which it is composed, but you don't take each strand and test its strength separately to discover what is the strength of the cable. You take them all twisted together to find the strength of the cable. A single strand might not be sufficient to hold a shallop, but the entire cable may be strong enough to hold a ship."

47. Defendants further assign as error the action of the court in refusing to give to the jury the special charges and each of them asked by the defendants to be given by the court to the jury and refused by the court as follows:

1.

"Before the defendants or any of them can be convicted under the indictment with which they stand charged the Government must satisfy you beyond a reasonable doubt of two things, viz.:

"First. That on or about October 4th, 1895, in the county of Hamilton and State of Ohio, and within the jurisdiction of this court, two or more of the defendants did then and there unlawfully, knowingly, and feloniously conspire together to commit an offense against the laws of the United States by conspiring to cause to be carried from Covington, in the State of Kentucky, to Cincinnati, in the State of Ohio, certain papers, certificates, and instruments purporting to be and to represent chances, shares, and interests in prizes which by lot and chance might be awarded to persons who might select the numbers which by lot and chance should be included in the twelve numbers drawn and selected at the drawings of the so-called Kentucky lottery and the so-called Henry lottery or either of them, enterprises offering prizes dependent upon lot and chance or commonly known as 'policy' and consisting in the drawing and selection by lot and chance at stated intervals of twelve of the numbers from one to seventy-eight, inclusive, and of awarding prizes in varying amounts to those who may have prior to the time of any one of the drawings and selections as aforesaid, upon the payment of a small sum of money, selected various combinations of numbers included in the said twelve numbers thereafter at said drawings drawn and selected by lot and chance as aforesaid; and,

"Second. That Albert L. France and Benjamin Hollen or either of them, to effect the object of such conspiracy, if you should find such conspiracy to have been entered into, at or about the time and place and for the purposes aforesaid, unlawfully, knowingly, and feloniously cause to be carried from Covington, in the State of Kentucky, to Cincinnati, in the State of Ohio, any papers, certificates, or instruments representing chances or interests in either of the lotteries aforesaid."

2.

"I charge you that the papers, certificates, or instruments purporting to be or representing chances or interests in lotteries to which the indictment in this case refers must, in order to convict the defendants or either of them, be shown to have been papers, certificates, or instruments in some drawing or drawings thereafter to take place, and not papers, certificates, or instruments in some drawing or drawings of either of said lotteries which had already taken place."

3.

"I further charge you that the conspiracy alleged in the indictment of conspiring to cause to be carried from one State to another, to wit, from Covington, in the State of Kentucky, to Cincinnati, in the State of Ohio, papers, certificates, and instruments representing or purporting to represent chances, shares or interests in the said lottery must be shown to be for the purpose of disposing of such papers, certificates, and instruments, and such purpose can not be inferred, but must be proved, like any other fact, by testimony which shall so satisfy you beyond a reasonable doubt."

4.

"The failure of any of the defendants to take the stand in his own behalf must not be considered by you in the least degree as evidence of guilt, and you must not allow such fact to weigh in your judgment in determining the guilt or innocence of the defendants or either of them."

5.

"I charge you that the act under which the defendants stand indicted, in so far as it attempts to prohibit the carrying from one State to another of papers, certificates, and instruments purporting to be or representing a ticket, chance, share, or interest in or dependent upon the event of a lottery or similar enterprise offering prizes dependent upon lot or chance, is unconstitutional and void, and your verdict therefore must be for the defendants."

and therefore, if you find that the so-called papers, instruments, or certificates charged in the indictment against the defendants to have been caused to have been carried from Covington, in the State of Kentucky, to Cincinnati, in the State of Ohio, in pursuance of a conspiracy, do not upon their face represent a ticket, chance, share, or interest in or dependent upon the event of a lottery or similar enterprise offering prizes dependent upon lot or chance, or if said alleged papers, certificates, or instruments purporting to be or represent a share, chance, or interest in or dependent upon the event of a lottery or similar enterprise offering prizes dependent upon lot or chance, are such papers, certificates, or instruments of a lottery which, prior to the time alleged of being carried as aforesaid, had already been drawn, then in that case I charge you that said so-called papers, instruments, or certificates are not such as are forbidden to be carried within the meaning of said statute."

10.

"If the jury should find that the defendants did unlawfully and knowingly conspire together to commit an offense against the United States, to wit, at the city of Covington and State of Kentucky, to cause to be carried from one State to another, to wit, from Covington, in the State of Kentucky, to Cincinnati, in the State of Ohio, papers, certificates, and instruments, papers not dependent upon the event of a lottery or similar enterprise, but papers which showed that a lottery had taken place and the numbers drawn at such a lottery, then I charge you that the defendants should be acquitted."

14.

"The law presumes every man innocent until he is proven guilty, and this presumption continues until removed by proof which satisfies the jury beyond a reasonable doubt."

15.

"If any member of the jury has a reasonable doubt as to the guilt of any person accused, it is his duty to withhold his assent to a verdict of guilty while such doubt remains in his mind.

"It is a well settled rule of law in criminal cases, where the proof adduced is circumstantial, that while they may tend to

5*a*.

"I charge you that any paper, certificate, or instrument which purports to be or represents a ticket, chance, share, or interest in or dependent upon the event of a lottery or similar enterprise offering prizes dependent upon lot or chance must be such paper, certificate, or instrument as upou its face purports to entitle the holder thereof to a chance, share, or interest in any so-called lottery or similar enterprise offering prizes dependent upon lot or chance, and the mere carrying of papers, instruments, or certificates showing the result of a lottery or similar enterprise which has already been drawn and which event has already taken place is not such a ticket, chance, share or interest in or dependent upon the event of a lottery or similar enterprise offering prizes dependent upon lot or chance coming within the meaning of the statute as defined under the act of March 2, 1895, 28 Statutes at Large, p. 963; and therefore, if you find that the so-called papers, instruments, or certificates charged in ~~the~~ indictment against the defendants to have been caused to have been carried from Covington, in the State of Kentucky, to Cincinnati, in the State of Ohio, in pursuance of a conspiracy, do not upon their face represent a ticket, chance, share, or interest in or dependent upon the event of a lottery or similar enterprise offering prizes dependent upon lot or chance, then your verdict must be for the defendants."

5 *b*.

"I charge you that any papers, certificate or instrument which purports to be or represent a ticket, chance, share, or interest in or dependent upon the event of a lottery or similar enterprise offering prizes dependent upon lot or chance must be such paper, certificate, or instrument as upon its face purports to entitle the holder thereof to a chance, share, or interest in any so-called lottery or similar enterprise offering prizes dependent upon lot or chance, and the mere carrying of papers, instruments, or certificates showing the result of a lottery or similar enterprise which has already been drawn and which event has already taken place, is not such a ticket, chance, share, or interest in or dependent upon the event of a lottery or similar enterprise offering prizes dependent upon lot or chance coming within the meaning of the statute as defined under the act of March 2, 1895, 28 Statutes at Large, p. 963;

show strong evidence of guilt, yet, if they are not inconsistent with the innocence of the defendants, the jury should acquit."

16.

"The jury find that the facts tending to show guilt upon the part of the defendant may fairly be reconciled with his innocence. I charge you that then a reasonable doubt does exist and the jury should acquit such person."

A.

"I charge you that as a matter of law from the facts proven that the defendants should go acquit, because there is no legal and valid proof that an offense of conspiracy was committed within the jurisdiction of this court."

48. And all the defendants jointly and each of the defendants for himself and the defendant Albert L. France individually and for himself assign and assigns as error the action of the court in refusing to give to the jury the special charges asked by A. L. France to be given to the jury and in refusing each of said charges so asked, as follows:

B.

"A. L. France moves the court to charge the jury that the verdict of the jury should be for him and not guilty."

C.

"A. L. France moves the court to charge the jury that as to him the United States has failed to make a case, and that the verdict of the jury should be in his favor."

D.

"A. L. France moves the court to charge the jury that as to him the verdict of the jury should be not guilty under each and every count of the indictment."

49. And the defendants further assign as error the action of the court in qualifying the charge offered by defendants, No. 10, over defendants' objection and exception as follows:

"The conspiracy may be to commit an unlawful act anywhere in the United States, but the conspiracy must have been made in Hamilton County, Ohio, and the overt acts of the defendants must have been committed in Hamilton County, Ohio. Facts testified to as having transpired in Covington can be considered only as evidential, and so far as they tend to prove the existence of the conspiracy in Hamilton county, Ohio, and that some act was there done in furtherance of it." "I do not think that the fact that the drawing has taken place is material; if the paper or certificate represents an interest in the drawing it is sufficient."

50. "The defendants further assign as error the action of the court in overruling their and each of their motions in arrest of judgment upon the grounds in said motion set out; as more fully appears of record herein."

51. "Defendants further assign as error the action of the court in overruling the motion and amended motion of the defendants and each of them for a new trial herein upon the grounds set out in said motion and amended motion, as more particularly appears of record herein."

52. "Defendants further assign as error the action of the court in overruling the motion for a new trial made by defendants upon the ground that the action of the court in sentencing the witnesses Irvine and Wagner, in the presence of the jury, to be confined in the county jail was prejudicial to the defendants herein."

ARGUMENT.

I.

We claim that so much of the act of March 2, 1895, as provides that "any paper, certificate, or instrument purporting to be or represent a ticket, chance, share, or interest in or dependent upon the event of a lottery, so-called gift concert, or similar enterprise, offering prizes dependent upon lot or chance," is unconstitutional, because it is an attempt to prohibit the carrying from one State to another, not by means of the mails, which we agree is within the power of Congress,—but as "traffic through national and interstate commerce,"—treating the carrying of such papers, certificates, or instruments as commerce, within the power of Congress to regulate.

In *ex parte* Jackson, 96 U. S., at page 735, Mr. Justice Field, speaking for this court, said:

"But we do not think that Congress possesses the power to prevent the transportation in other ways, as merchandise, of matter which it excludes from the mails. To give efficiency to its regulations and prevent rival postal systems, it may perhaps prohibit the carriage by others for hire, over postal routes, of articles which legitimately constitute mail matter, in the sense in which those terms were used when the constitution was adopted, consisting of letters, and of newspapers and pamphlets, when not sent as merchandise; but further than this its power of prohibition can not extend."

The Jackson case was one of habeas corpus, and the indictment under which he was convicted was under Section 3894, of the Revised Statutes, which provides that "no letter or circular concerning illegal lotteries, so-called gift concerts, or other similar enterprises offering prizes, or concerning schemes devised and intended to deceive and defraud the public for the purpose of obtaining money under false pretenses, shall be carried in the mail."

We contend, in the first place, that the papers, certificates and instruments offered in evidence which were carried by the persons named, from Covington, Kentucky, to Cincinnati, Ohio (see Exhibits on pp. 313 and 314, and Exhibit "D" on third page preceding page 313 of record), were not merchandise or "articles which legitimately constitute mail matter." These certificates, more properly called the official result or announcement of a drawing which had already taken place, the lottery whose numbers had come out of the wheel at a drawing which had already taken place and which were being communicated to the public by means of these printed slips, announcing the result, that at the Kentucky lottery on a given day and at the Henry lottery on a given day, drawn in Covington, Kentucky, the numbers printed thereon had been drawn from the wheel, thereby advising those who may have made bets on the result of such drawing, whether they had won or not, can in no manner be considered or constitute merchandise—the subject of national or inter-state commerce regulation, other than by the mails, provided for in said act. While the largest latitude may be given Congress to regulate the mail, excluding therefrom lottery matter of every kind; yet, as this court has said in the Jackson case, "further than this its power of prohibition can not extend." To hold that Congress has the power to regulate or prohibit the sending of results of a lottery on the ground that it is "commerce," is to recognize the fact that a lottery is a commercial transaction. What is commerce? "It is an interchange or mutual change of goods, wares, productions, or property of any kind between nations or individuals either by barter or by purchase and sale, trade, traffic." "The design and object of the power embraced in Article 1, Section 8, of the Constitution of the United States was to establish a perfect equality among the several states as to commercial rights," etc.

Gibbons v. *Ogden*, 9 Wheat., 1.
City of New York v. *Miln*, 11 Peters, 102.
Brown v. *State of Maryland*, 12 Wheat, 419.
License Cases, 5 How., 504.
Veazie v. *Moor*, 14 How., 573.

Commercial intercourse is an element of Commerce which comes within the regulating power of Congress. It includes the means by which commerce is carried on (Hare on Con. Law, 479 and 1257), and includes as well instrumentalities of commerce.

Pensacola Tel. Co. v. *Western Union Tel. Co.*, 96 U. S. 1.

"Taking the term commerce in its broadest acceptation—supposing it to embrace not merely traffic but the means and vehicles by which it is prosecuted—can it properly be made to include objects and purposes such as those contemplated by the law under review?" *Veazie* v. *Moor*, *supra.* Telegrams would become an instrumentality of commerce, but would lotteries?

See *Paul* v. *Virginia*, 8 Wall., 168, 183.
Crandall v. *Nevada*, 6 Wall., 35.
Phila. Fire Ins. Co. v. *New York*, 119 U. S., 110.

"Every species of property which is the subject of commerce or which is used or even essential to commerce is not within the control of Congress." *U. S.* v. *Steffins*, 100 U. S., 95. The legislation of Congress as to trade marks is not and is void for want of constitutional authority.

In *Phila. Fire Ins. Co.* v. *New York*, 119 U. S., 118, this court decides that the issuance of a policy of insurance is not a transaction of commerce.

In *Welton* v. *Missouri*, 91 U. S., 280, the court say:

"Commerce is a term of the largest import. It comprehends intercourse for the purpose of trade in any and all its forms, including the transportation, purchase, sale, and exchange of commodities between the citizens of our country and the citizens of different states. The power to regulate it embraces all the instruments by which such commerce may be conducted. So far as some of these instruments are concerned, and some subjects which are local in their operation, it has been held that the states may provide regulations until Congress acts with reference to them; but where the subject to which the power applies is national in its character, or of such a nature as to admit of uniformity of regulation, the power is exclusive of all state authority."

And in the Trade Mark Cases, 100 U. S., 95, this court say:

> "Every species of property which is the subject of commerce, or which is used or even essential in commerce, is not brought by this clause within the control of Congress. The barrels and casks, the bottles and boxes in which alone certain articles of commerce are kept for safety and by which their contents are transferred from the seller to the buyer, do not thereby become subjects of congressional legislation more than other property. *Nathan* v. *Louisiana*, 8 How., 73. In *Paul* v. *Virginia*, 8 Wall. 168, this court held that a policy of insurance made by a corporation of one State on property situated in another, was not an article of commerce, and did not come within the purview of the clause we are considering."

See "Commerce,"
Veazie v. *Moor*, 14 How., middle p. 573.

It must be remembered that the act in 28 Statutes at Large, 963, supra, is not an interstate commerce act nor an amendment thereto.

In *Pensacola Tel. Co.* v. *Western Union Tel. Co.*, 96 U. S. supra, at page 9 the court, through Chief Justice Waite, defines why a telegraph company may be considered within the power of Congress to regulate as commerce, because the court say: "It is indispensable as a means of inter-communication, but especially is it so in commercial transactions. The statistics of the business before the recent reduction in rates show that more than eighty per cent of all the messages sent by telegraph related to commerce. Goods are sold and money paid upon telegraphic orders. Contracts are made by telegraphic correspondence, cargoes secured, and the movement of ships directed. The telegraphic announcement of the markets abroad regulates prices at home, and a prudent merchant rarely enters upon an important transaction without using the telegraph freely to secure information. It is not only important to the people, but to the government. By means of it the heads of the departments in Washington are kept in close communication with all their various agencies at home and abroad, and can know at almost any hour, by inquiry, what is transpiring anywhere that affects the interest they have in charge. Under such circumstances, it can not for a moment be doubted that this powerful agency of commerce and inter-communication comes within the controlling power of Congress, certainly as against hostile State legislation."

We maintain, therefore, that it is not within the constitutional power of Congress to prevent the carrying from one State to another, except through the mails, of any papers, instruments or certificates giving the result of a lottery which has already been drawn. It doubtless could prevent the carriage through the mails of a newspaper from one State to another, which printed the result of a drawing, by virtue of its exclusive power and control over the mails, but could it prohibit the carriage by other means, of newspapers from one State to another giving the result of such lottery? As well might it be maintained that it would be within the power of Congress to prohibit the telephoning from Covington, Kentucky to Cincinnati, Ohio of the result of a lottery that had been drawn on some preceding day, or to prevent a person, who might be able to remember the twelve numbers which had been drawn from the wheel and which he had seen come out of the wheel in Covington, from going to Cincinnati and communicating to those whom he desired, the information or news of what numbers had come out at the drawing on that or any preceding day. If Congress has no power to prohibit a person from memorizing the numbers drawn from a wheel and communicating them by word of mouth from one State to another, or if it is not within the power of Congress to prevent the transportation by other means, than through the mails, of newspapers published in one State, to another, giving such information as a matter of news—how can it prevent the carrying of printed slips giving the result of such drawing from one State to another by means other than the mails? Where is the commerce which it seeks to regulate? Even if a lottery could in any sense be considered a species of commerce, yet how can that be considered commerce which simply announces as a matter of news, the result of a drawing—something which has already taken place, whose function has ended—for whatever mischief the lottery may have done as an immoral or illegal agency, yet when its drawing has taken place, its function and life ends with the drawing itself.

In this connection we do not undertake to discuss—because unnecessary—what would have been the effect if the defendants had been indicted and convicted of causing to be carried from one State to another any "paper, certificate, or instrument purporting to be or represent a ticket, chance, share, or interest in or dependent upon the event of a lottery, so-called gift concert, or similar enterprise, offering prizes dependent upon lot or chance," because the act clearly contemplates that nothing which shall represent a ticket or interest in a lottery which is "dependent upon lot or chance," oı "the event of a lottery, offering prizes dependent upon lot or chance," *about* to be drawn, shall be carried from one State to another; the evident purpose being to suppress the traffic by prohibiting the carriage of such tickets dependent upon the event of a lottery about to be drawn. But if the lottery drawing has already taken place, as in this case, how can the language of the act be distorted into applying to carrying information as to the *result* of such lottery, as news of what has occurred, by sending the printed slips containing such information from one State to another? The act, even if we assume for the sake of argument is constitutional, yet it does not and can not bear any interpretation, further than to mean that it shall be unlawful to carry from one State to another a ticket or instrument or anything representing a ticket or chance in a lottery or scheme of chance "dependent upon the event of a lottery." It does not say or mean that it shall include as illegal or unlawful, the carrying of the result of such lottery which has already been drawn, and whose life has been ended by the drawing itself. This contention is covered by several assignments of error. By the forty-seventh assignment of error, in refusing to give charge 2 quoted on page 327 of the record, which is in the following language:

"I charge you that the papers, certificates or instruments purporting to be or representing chances or interests in lotteries to which the indictment in this case refers, must, in order to convict the defendants or either of them, be shown to have been papers, certificates or instruments in some drawing or drawings, thereafter to take place, and not papers, certificates or instruments in some drawing or drawings of either of said lotteries which had already taken place."

And also in refusing to give charge 5b, folio 630, page 304, covered by the same assignment of error and found on folio 687, page 328, and in overruling the motions in arrest of judgment covered by the fiftieth assignment of error, folio 691, page 334, which motions are found on pages 58 *et seq.* folio 106, and of the fifty-first assignment of error, folio 691, page 331, being motions for a new trial, the motions being found on page 64, folio 115, *et seq.*, and by the motion of defendants, when the Government rested its case, to acquit—found on folio 560, page 275, third ground of motion, and covered by assignment of error No. 34, found on folio 670, page 321—thus presenting the question as to the constitutionality of the act in question, and of the interpretation thereof, and as not being applicable to the carrying of results as hereinbefore set forth, fully and in various forms. And also applies to the charge contained in the 6th count of the indictment, as to the "hit slip" found on one of the winesses before the grand jury, giving the result of a bet or winning.

II.

During the trial of the case the Government was allowed, over the objection of the plaintiffs in error, to introduce evidence of certain grand jurors and the Assistant District Attorney as to what took place in the grand jury room when the witnesses Wagner, Edgar and Irvine testified before that body, on which occasion the exhibits offered in evidence by the Government, to wit, the printed results of the drawings (Exhibits "G," "H" and "J," pages 313, 314, Record) and the "hit slip" (Exhibit "D," fourth page, after page 312, Record), which is another way of announcing the result of a winning or bet, were produced by these witnesses when subpœnaed to testify before the grand jury, which exhibits were left with the District Attorney by these witnesses and identified by them and used in evidence as the predicate of the charge of "causing to be carried from one State to another" the papers in question. Our objection to this evidence was, first, that it was as to a *subsequent act.* The offense, if any, had already been committed, the carrying from Covington, Kentucky, to Cincinnati, Ohio, or causing to be carried from Covington to Cincinnati, was completed when these men crossed the bridge with these official reports on their persons and set foot on Ohio soil. Permitting the grand jurors (see testimony, pages 257 to 269 inclusive), and the Assistant District Attorney (page 267) to testify that before the grand jury these men had produced these papers and identified them, was testimony of a subsequent act. If the offense was completed in carrying from Covington to Cincinnati the papers in question, how is it competent to prove that fact by something that was afterward done or said in the grand jury room? The testimony was not direct or even circumstantial. To photograph and thus reproduce before the jury which tried the defendants, testimony produced to the grand jury by these witnesses who were not defendants nor indicted, in which the defendants were not present or parties, nor in any way connected with the transaction, was, it seems to us, clearly incompetent and prejudicial to the defendants, and was error. It was in the nature of hearsay evidence and *ex parte* in its character, telling what occurred without the right of cross-examination. We grant that what was said or done before a grand jury may be offered to *contradict*, but not to prove a substantive fact. See testimeny of Tolle (Assigments of Error, 12 to 29 inclusive), found on pages 257 to 269 inclusive.

III.

The action of the court in permitting the witnesses, Wappenstein and Hill, one a detective officer of Cincinnati, and the other a lieutenant of police in the city of Cincinnati, to testify that on some other occasion long prior to the time laid in the indictment, they had arrested the witnesses, Wagner, Irvine, and another person by the name of Vickers, none of whom were defendants in this action, and that upon bringing them to the police station they were searched, and that upon their persons certain packages, with money and slips of paper with numbers were found, similar to the printed slips marked Exhibit E, offered by the Government in this case, was error; covered by assignments of error numbered 30 and 31 respectively, the testimony of which officers may be found on pages 269 to 273 inclusive. The defendants are charged with having committed the act in question on or about October 4, 1895. It appears by the testimony of these officers referred to that in April, 1895, they arrested these men on their way from Cincinnati to Covington and took them to the station house and found certain papers and money on their persons when searched, consisting of "yellow paper with a lot of figures on it."

How can it be competent to introduce testimony of these officers, as against these defendants in no manner connected with them at the time, to prove that nearly six months prior to the time laid in the indictment in question, three persons, not defendants in this case, were arrested on a certain occasion going from Cincinnati to Covington, and that upon their persons when searched at the station house, were found certain papers, similar in kind to the exhibits offered in evidence against the defendants in this case, which exhibits were found on the person of two of these witnesses when they appeared before the grand jury, as set out in the previous subdivision of this argument? It seems to us, as well might the defendants be convicted of carrying concealed weapons, because if the search had disclosed concealed weapons on these witnesses, defendants would be responsible therefor, or in some manner connected therewith. It was a collateral matter, and entirely independent of the charge against these plaintiffs in error. If the purpose of admitting this testimony was to show circumstantially that, because two of these men were the same men who appeared six months later before the grand jury, and upon whose persons were found papers similar in character to those which they had on their persons when arrested on some other charge by the State authorities of Ohio, and then incidentally show that on other occasions two of these witnesses had been seen leaving the office of one of the plaintiffs in error in Covington, going to the offices of others of the plaintiffs in error in Cincinnati, we claim that the testimony is too speculative and uncertain in its character, and would scarcely be admitted in a civil case, much less in a criminal case in which the liberty and property of defendants are at stake.

IV.

To the same effect is the character of the testimony of the witness, F. W. King, that one Richard B. France, Henry Mitchell and John Spiller—not defendants in this action—were engaged in drawing lottery numbers at the building at the corner of Fifth and Madison Streets in the city of Covington, Kentucky, because the witness, by means of a speaking tube, overheard numbers being called out, and that they corresponded with numbers on certain slips which he had seen at a butcher shop and other places, which is assigned as the 35th assignment of error, and which testimony is found on pages 182 and 183 of the Record. It seems to us clearly that this was pursuing to the remotest possible degree, mere straws, blown by the wind, with which to pile up remote circumstances upon which to convict the plaintiffs in error herein. It is not shown that either of the plaintiffs in error were present or knew of the calling of these numbers in the building, which this witness overheard by means of a speaking tube, or that it was the same lottery or that any of the numbers shown on the exhibits offered by the Government as having been drawn from the wheel of the Kentucky and Henry lottery, were the same as those which he heard through the speaking tube, and which it is not shown that either of the plaintiffs in error were aware of, were present at, or in any manner participated in. Clearly this testimony was incompetent and prejudicial to the plaintiffs in error.

V.

The 4th, 5th, 6th, 7th, 8th, 9th, 10th and 11th assignments of error, which relate to the testimony of E. B. Seeley, a witness offered by the Government, whose testimony begins on page 104 and continues to page 111 inclusive, relates to certain questions asked of the said witness and excepted to at the time, and to the admission of which these assignments were made. In the 4th assignment it is as to the witness testifying that Albert L. France, one of plaintiffs in error, was running a policy business in the year 1895, because this is a conclusion and does not state facts from which the jury are to determine. The next assignment is as to the witness being allowed to testify that the business in which he was working for Mr. France was writing out a policy book, and explaining what a policy book is, and the answers of the witness to the effect that the witness sat in his office and players came in and gave to witness the numbers they wished to play, paid the amount of money they wished to put on numbers, and that said numbers were put upon a tissue sheet arranged for copying, and thereafter a carrier came and took the same over to the main office, and at a later time the carrier came back, and if any person had won any money it was in an envelope;—because these are recitals of what the witness did when he was a policy writer, long prior to the time mentioned in the indictment. And the question in the 6th assignment, that the plaintiff in error, Maurice J. Richmond, was "manager" on this side, and what Richmond directed to be done, and what other policy shops there were in the city of Cincinnati, and that one of plaintiffs in error, George Williams, wrote in an office at John and Third streets, and that Mr. Vicker (not one of plaintiffs in error) had an office at 236 Third street, and "that they were all over the city in nearly every street in town," and that "H." and "K." are different policy books run by the same persons, and that a certain paper shown to the witness was one of the official prints which they (meaning witness and others) always got back morning and evening, representing numbers drawn in the "H." and "K." lottery, and explaining that the top row were the numbers as taken out of the wheel, and the lower row of numbers were in their regular order; "K." means Kentucky, and that 521 on said paper is the class number or number of the drawing, and that the class numbers change daily, morning and afternoon, and that "95" is the year, and that "H." on said paper means "Henry" or "Henrietta," and that those are different books run by the same people; and to the question, "This represents a bet, does it?" and the answer of the witness that it did, and the admission in evidence of said alleged bet, being Exhibit "A" (first page after page 312, Record), to the testimoney of Seeley, because said testimony as set out in the assignments of error 4 to 11 both inclusive, was an attempt to prove by the witness, as an expert, that certain numbers of these "official prints" had a signification and meaning other and different from what the papers themselves on their face bore, or represented, and that therefore the exhibits offered by the Government must necessarily have the same meaning, signification and interpretation, which the witness undertook to give as the meaning of the official prints which were shown to him.

We claim that "any paper, certificate, or instrument purporting to be or represent a ticket, chance, share or interest in or dependent upon the event of a lottery, so-called gift concert or similar enterprise, offering prizes dependent upon lot or chance," must be such an instrument as by its *terms* constitutes what the language of the act sets out. It is not pretended in any of the testimony offered by the Government or otherwise, that any of these papers or the exhibits of a single witness offered by the Government or any of the papers produced by the witnesses who testified before the grand jury, and which papers were retained by the Government and used as evidence in this case, in *themselves*, show in any manner that a single one of them represents on its face that it was "any paper, certificate or instrument purporting to be or represent a ticket, chance, share or interest in or dependent upon the event of a lottery, so-called gift concert, or similar enterprise, offering prizes dependent upon lot or chance." It was no such instrument, nor did it "purport" to be such a ticket; nor did it on its face "represent any interest in" or "any chance," or "any ticket," or "any share dependent upon the event of any lottery, or similar enterprise." The papers themselves, to any one *but* an expert such as Seely professed to be, were simply a series of numbers printed on a piece of paper headed, one set with the letter "H." and the other set with the letter "K.," signed by no one, on its face issued by no one, certifying to nothing, promising nothing, agreeing to nothing, bearing no name or signature, or other device, absolutely meaningless to the world, and yet this witness was allowed to interpret what the figures and letters on these printed slips meant, viz., that they were the printed results of the twelve numbers drawn respectively from the "H." and "K." Lotteries, which he said meant "Henry" and "Kentucky" Lotteries. To be a "paper," "instrument" or "certificate" it must "purport" to be or "represent a ticket, chance, share or interest in or dependent upon the event of a lottery." Not a single paper offered in evidence on its face represented or purported to represent a ticket, chance, share or interest in or dependent upon the event of a lottery, or similar enterprise. On their face these papers represented nothing, and it required the testimony of an expert to say that they were simply official prints, the results of drawings which had already taken place. But this is what the defendants—plaintiffs in error—were convicted of, causing to be carried these printed slips from Covington, Kentucky to Cincinnati, Ohio, and thereby were engaged in a conspiracy to violate Section 1 of the act passed March 2, 1895, when we claim that the whole testimony upon which the prosecution was based and upon which the conviction was secured, was the admission of these so-called papers, certificates, etc., which did *not* represent what the statute demands as a necessary prerequisite, viz., a "ticket, chance, share or interest in or dependent upon the event of a lottery." They represented nothing, so far as the world was concerned, and by the interpretation of this so-called expert witness did not represent "any ticket, chance, share or interest in or dependent upon the event of a lottery, or similar enterprise." The possession of any one of the papers offered by the Government or by any witness would not have entitled the holder to any winning in any lottery drawn or to be drawn, for they did not represent or purport to "represent any ticket, chance, share or interest in or dependent upon the event of a lottery, or similar enterprise," but were the printed results of such lottery after the same had been drawn, after its function had ceased, after the lottery was a thing of the past.

To the same effect is the assignment of error No. 32 and the testimony of the same witness, Seeley, asking witness to make out a book in which he entered a bet, and to the admission of the said book marked Exhibit "B" (second page after page 312, Record) to Seeley's testimony.

VI.

The 34th assignment of error is to the action of the court in overruling the motion on behalf of each of the defendants that the court direct the jury to acquit the defendants, which motions are found on page 275 of the record, these motions having been made after the Government had rested its case and reaches each and every exception and assignment of error, practically—for the reasons: First, that the indictment does not charge an offense within the jurisdiction of the court; second, because the facts and statements contained in the indictment charge no crime against any valid law of the United States; third, because the said act of March 2, 1895, is an act not within the constitutional power of the Congress of the United States in so far as therein contained, to wit, that "any person who shall cause to be carried from one State to another in the United States, any paper, certificate, or instrument purporting to be or represent a ticket, chance, share, or interest in or dependent upon the event of a lottery, so-called gift concert, or similar enterprise, offering prizes dependent upon lot or chance," and is therefore illegal and void; fourth, because there is not sufficient proof to support a conviction under any count in the indictment as against the several defendants (plaintiffs in error). Which motion was made on behalf of each of the defendants and overruled, and the assignment of error noted as herein stated. We claim in support of this assignment of error all the grounds contained in the motions as above set out, and the admission of the testimony of the witnesses King and Seeley, as set out in the previous assignments of error, and the admission of the testimony of the witnesses as to what was testified to by other witnesses before the grand jury, which indicted the defendants, and of the officers of the State of Ohio as to what was found upon the persons of certain witnesses on being arrested, long prior to the time laid in the indictment herein, and to the fact that the papers or instruments, which were offered in evidence, did not on their face or otherwise, represent a "ticket, chance, share, or interest in or dependent upon the event of a lottery, so-called gift concert, or similar enterprise, offering prizes dependent upon lot or chance," because the Government did not claim under the indictment or proofs that the papers offered in evidence and which the defendants were convicted of causing to be carried, represented any "ticket, chance, share or interest in or dependent upon the event of a lottery or similar enterprise," but were simply the printed results of drawings which had already taken place and therefore within the meaning of said act, their carriage was no violation of its terms nor any offense against the same, even if the portion of the act referred to be constitutional.

VII.

The next assignments of error are Nos. 37, 39 and 40, and pertain to the charge of the court: As to 37 found on page 290; as to 39 and 40 found on pages 297 and 298; ~~and as to 41 found on pages 298 and 299~~ of the printed record respectively.

Assignment No. 37 referred to (Record, page 290) is as to the charge of the court: "If any one or more of them did any one of the acts charged in the indictment as having been done in futherance of the scheme, all the defendants are guilty as charged." "That is to say, if the defendants or two or more of them did conspire to cause to be carried from Covington, in the State of Kentucky, to Cincinnati, in the State of Ohio, the papers, certificates, and instruments described and charged in the indictment, and any one or more of them did any act in Hamilton County, Ohio, to effect the object of the conspiracy, all who were parties to the conspiracy are guilty as charged." We submit that this was clearly error because the court had at the same time told them that the purpose of the section, quoting from the act of March 2, 1895, should be construed as if to read as follows: That "any person who shall cause to be carried from one State to another in the United States any paper, certificate, or instrument purporting to be or to represent a ticket, chance, share, or interest in or dependent upon the event of a lottery, so-called gift concert, or similar enterprise, offering prizes dependent upon lot or chance," shall be punished as provided in the act, when the indictment did not charge, nor did the proof offered show that defendants had caused to be carried, "any paper, certificate, or instrument, purporting to be or represent a ticket, chance, share, or interest in or dependent upon the event of a lottery"—because the lottery, as stated before, had already been drawn—its function had ended, it had ceased to be, and therefore was not "dependent upon the event of a lottery, so-called gift concert or similar enterprise."

The fortieth assignment of error is to so much of the charge found on pages 298 and 299 of the record as treats of witnesses who have been impeached, and in telling the jury as to them "but you are not bound to reject his testimony, nor are you bound to accept it. It does not destroy his testimony necessarily; it only goes to his credit or credibility with the jury. The jury, nevertheless, are to determine." We claim that this is unfair, telling the jury that notwithstanding the impeachment of the witnesses as being unworthy to be believed under oath, nevertheless, it does not destroy their testimony, and that the jury are to determine whether they will believe the testimony or not, notwithstanding such impeachment.

VIII.

The forty-second assignment of error is as to the definition in giving the special charge and modifying the same, found on page 300 of the record, which was that "a criminal conspiracy consists not merely in the intention of two or more to do an unlawful act, but the gist of the offense is the mutual agreement of the two or more to do the unlawful act in the manner and by the means set forth in the indictment," which the court gave with the understanding that the word "agreement" is to be construed and understood as he had already given in the charge, which practically destroyed the effect of the special charge. The only reference in the court's general charge to the subject of "agreement" is found on page 293, folio 604, Record in which he says: "Although the common design is the root of the charges, yet it is not necessary to prove that the defendants came together and actually agreed in terms to have the common design and to pursue its common means and so carry it into execution," etc.

Assignment of error forty-three is as to the modification of the special charge asked by defendant, in the manner following: "The fact that the defendants may each or all of them have been engaged in the policy business does not of itself warrant the jury finding them guilty as charged, for if the jury find that each acted for himself, that is, without an agreement or confederation to do the unlawful act with the other, then I charge you under this indictment your verdict must be not guilty," which the court qualified by saying, "I give it with this qualification, that you must take the expression 'without an agreement or confederation,' in the sense already given in this charge. It is not necessary to show that they ever acted together; it is not necessary to show that they ever saw each other. If the testimony shows a concert of action in carrying out the purpose charged in the indictment, that, as I have already explained, will sustain the charge."

The same reason applies here as to the forty-second assignment of error.

The forty-fourth assignment of error relates to the action of the court in modifying a certain special charge, folio 622, bottom page 301. The special charge asked was, "the jury can presume no material fact to exist unless it is fairly taken from the evidence adduced." This proposition rested upon the perfectly correct theory that it was for the Government to prove every material fact necessary to make up the offense of conspiracy, and that if they failed to prove any one of the essential material facts, the defendants were entitled to a verdict. The charge of the court modified this request so that, if we correctly infer the metaphor used by the court, he told the jury, in substance, that it was not necessary that the Government should prove every material fact constituting the offense of conspiracy, but "from the facts taken altogether, not one by one," the conspiracy was to be inferred. "They are to be taken like a cable, which is made up of the separate strands of which it is composed; but you don't take each strand and test its strength separately to discover what is the strength of the cable; you take them all twisted together to find the strength of the cable. A single strand might not be sufficient to hold a shallop, but the entire cable may be strong enough to hold a ship." This metaphor is an utterly false statement of the rule of law applicable. A correct metaphor would be to compare the facts necessary to prove the offense of a conspiracy with a chain in which each link must be tested separately, and the failure of any link breaks the whole chain. So the failure to prove any material fact essential to constitute the offense of conspiracy entitled the defendants to an acquittal.

Assignment of error forty-seven is to the action of the court in refusing to give to the jury the special charges and each of them, which are numbered 1, 2, 3, 4, 5, 5a, 5b, 10, 14, 15, 16, A B C and D, and which special charges are found on pages 303 to 306, inclusive, and are fully set out in the assignments beginning on pages 327 to 330 inclusive, and briefly stated are as follows:

First. That before defendants or any of them can be convicted under the indictment, viz., that on or about October 4, 1895, in the county of Hamilton and State of Ohio, they did unlawfully conspire to cause to be carried from Covington to Cincinnati "certain papers, certificates and instruments purporting to be and to represent chances, shares and interests in prizes which by lot and chance might be awarded to persons who might select the numbers which by lot and chance should be included within the twelve numbers drawn and selected," etc., "to those who may have prior to the time of any one of the drawings and selections aforesaid, upon the payment of a small sum of money, selected various combinations of numbers included in the said twelve numbers thereafter drawn and selected by lot and chance as aforesaid."

Second. "That said France and Hollen, to effect the object of such conspiracy, if you should find such conspiracy to have been entered into, at about the time and place and for the purpose aforesaid, unlawfully, knowingly and feloniously cause to be carried from Covington, in the State of Kentucky, to Cincinnati, in the State of Ohio, any papers, certificates, or instruments representing chances or interests in either of the lotteries aforesaid."

The error in refusing this charge is apparent from the reading of the charge itself, because to constitute an offense the "papers," "certificates" and "instruments" referred to must have pertained to a lottery *to be* drawn and not to one *already drawn* as before stated, and that France and Hollen or either of them, to effect the object of such conspiracy, if there was any, caused to be carried from Covington to Cincinnati "papers, certificates and instruments" representing chances or interests in either of the lotteries aforesaid of a drawing to take place, and not one which had already taken place, and therefore it seems to us it was manifest error to have refused this charge.

The same is true of special charge No. 2 (forty-seventh assignment of error), found on page 303, which is as follows:

"I charge you that the papers, certificates, or instruments purporting to be or representing chances or interests in lotteries to which the indictment in this case refers must, in order to convict the defendants or either of them, be shown to have been papers, certificates, or instruments in some drawing or drawings thereafter to take place, and not papers, certificates, or instruments in some drawing or drawings of either of said lotteries which had already taken place."

This it seems to us was clearly the gist of the offense within the meaning of the act referred to, and any *other* papers or certificates, as of a drawing which had already taken place, was not a violation of the terms of said act.

Special charge No. 3 (covered by the same assignment), pages 303 and 304 of the Record, is based upon the beginning of said act of March 2, 1895, which provides "that any person who shall cause to be brought within the United States from abroad, *for the purpose of disposing of the same*," (italics ours) or carried from one State to another must be *for the purpose of disposing of the same*, which neither the indictment nor the proof claims or sustains, and is an essential prerequisite and element of the charge, viz., that it can be no offense to carry or cause to be carried from one State to another any of these papers, unless it be averred and proven, to be, *for the purpose of disposing of the same*.

Special charge No. 4 refused (same assignment), found on page 304 of the Record, we think was clearly error, namely, that "The failure of any of the defendants to take the stand in his own behalf must not be considered by you in the least degree as any evidence of guilt, and you must not allow such facts to weigh in your judgment in determining the guilt or innocence of the defendants or either of them."

The refusal of the court to give this charge, either in its general charge or as specially requested, was, in effect, turning the right given to the prisoners to testify in their own behalf, intended by the Legislature as a shield for their protection, into a sword for their destruction.

Special charge 5 (same assignment), found on the same page, as to the unconstitutionality of the act or so much as is set forth in the special charge, has already been commented upon, and charges 5a and 5b, pages 304 and 305, that "any paper, certificate, or instrument which purports to be or represent a ticket, chance, share, or interest in or dependent upon the event of a lottery, or similar enterprise, offering prizes dependent upon lot or chance," must be such paper, certificate, or instrument as upon its face purports to entitle the holder thereof to a chance, share or interest in or dependent upon the event of a lottery offering prizes dependent upon lot or chance, and the mere carrying of papers and instruments showing the result of a lottery or similar enterprise, which has already been drawn and which event has already taken place, is not such ticket, chance, share or event offering prizes dependent upon lot or chance, within the meaning of the statute as defined under the act of March 2, 1895, 28 Statutes at Large, 963; and therefore, if you find that the so-called papers, instruments, or certificates charged in the indictment against the defendants to have been caused to have been carried from Covington, in the State of Kentucky, to Cincinnati, in the State of Ohio, in pursuance of a conspiracy, do not upon their face represent a ticket, chance, share, or interest in or dependent upon the event of a lottery or similar enterprise offering prizes dependent upon lot or chance, then your verdict must be for the defendants." This point has already been covered, and therefore we need add nothing here.

The same may be said as to charge 5b, pages 304 and 305 of the Record.

The refusal to give charge 10, found on page 305, practically comes under the same heading, and refers to the fact that if the lottery had already taken place and the numbers had been drawn, it was not within the meaning of the act.

Special charges 14, 15 and 16, page 306 of the Record, are simply as to presumption of innocence, and we claim the court erred in refusing to give the same.

Assignment of error 48 covers B, C and D, and relates to the defendant, Albert L. France, found on page 306 of the Record, and which, as to him, we claim the Government failed to make a case, and the verdict should be in his favor, etc.

Assignment of error 49, found on page 305 of the Record, is as to the court's qualifying charge 10 offered by defendants, to wit: "The conspiracy may be to commit an unlawful act anywhere in the United States, but the conspiracy must have been made in Hamilton County, Ohio, and the overt acts of the defendants must have been committed in Hamilton County, Ohio. Facts testified to as having transpired in Covington can be considered only as evidential, and so far as they tend to prove the existence of the conspiracy in Hamilton County, Ohio, and that some act was there done in the furtherance of it, I do not think that the fact that the drawing has taken place is material. If the paper or certificate represents an interest in the drawing it is sufficient," was on the ground that this qualification of the charge, holding that the fact that the drawing had taken place was not material, was erroneous for reasons already stated.

IX.

Assignments of error Nos. 50 and 51 to the action of the court in overruling the motions in arrest of judgment and for a new trial, upon the grounds set out in said motions, found on pages 58, 64, 83, 154, 155, 156, 162, 163 and 307 of the Record, we think was error; the motions in arrest of judgment being based upon all the assignments of error already referred to and set out in the motions; first, because the indictment does not charge an offense within the jurisdiction of this court; second, because the proof adduced does not show an offense committed within the jurisdiction of this court; third, because the facts and statements contained in the indictment charge no crime against any valid law of the United States; fourth, because the act of March 2, 1895, in so far as the same is contained and set forth in this indictment, and more particularly mentioned in the words of said statute, to wit: "That any person who shall cause to be carried from one State to another in the United States any paper, certificate, or instrument purporting to be or to represent a ticket, chance, share, or interest in or dependent upon the event of a lottery, so-called gift concert, or similar enterprise offering prizes dependent upon lot or chance," is not an act within the constitutional power of the Congress of the United States and is therefore illegal and void.

X.

The 52nd assignment of error is as to the action of the court in sentencing the witnesses Irvine and Wagner in the presence of the jury to be confined in the county jail for contempt, which was prejudicial to the defendants. See pages 83, 154, 155, 156, 162 and 163 of the Record. Page 83 shows amendment to motion. Pages 154, 155, 156 and 162 and 163 show the action of the court in repeatedly sentencing these witnesses in the presence of the jury for refusing to answer certain questions which they claimed as privileged, on the ground that the answers might incriminate them. We claim that this was error on the part of the court, greatly prejudicial to the defendants. Here were two witnesses who were asked certain questions which they declined to answer on the ground that the answers might incriminate them and which the court told them would not incriminate them, and persisting in their refusal to answer, sentences of imprisonment were repeatedly placed against the witnesses in the presence of the jury, which must in itself have had an effect upon the minds of the jury against the defendants. For example, the question was asked Joseph C. Wagner (Record, page 161):

"Q. Do you know Benjamin Hollen? (one of the defendants).

"A. Yes, sir.

"Q. What was his business in October last year and during 1895.

"A. I decline to answer that question on the ground that it might tend to incriminate me."

Which the court insisted he must answer, and refusing to answer sentenced him to the Warren County jail. He was asked if he knew Robert W. Irvine (not a defendant), and on saying, yes, he was asked what Irvine's business was in October, 1895, which he declined to answer on the same ground and was sentenced in the presence of the jury for contempt. The other questions to the other witnesses are of the same character. On page 153 of the Record Robert W. Irvine was asked if Albert L. France (one of the defendants) was not prior to October of the last year and in 1895 engaged in managing and connected with the "H." and "K." lotteries, which he declined to answer on the ground that it might tend to incriminate him, and for refusing to answer the court sentenced him in the presence of the jury. And the same as to Benjamin Hollen and the like sentence for refusing to answer, and as to George Williams, one of the defendants, with like result, and as to George Bickle (pages 154, 155, 156).

While it may be a little outside of the record, it is nevertheless proper to state that the action of the court in thus sentencing these witnesses for contempt, for refusing to answer these questions was, on habeas corpus, and by the full bench of the Circuit Court, including the trial judge himself (Judge Sage), reversed and the said witnesses discharged—thus showing that the witnesses were justified in refusing to answer these questions, so that the action of the court was wrong in imposing sentences of contempt upon them and especially in presence of the jury, to the prejudice of the defendants;—and must have had a controlling influence in the minds of the jury for the court to have said in their presence, that they were questions that the witnesses were obliged to answer; that it would not tend to incriminate them, and to punish them by sending them to jail for refusing to answer, which action, as we have already stated, has since been decided to be erroneous.

We therefore respectfully submit, that the judgment of the District Court should be reversed.

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64-676

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Clerk

Supreme Court of the United States.

164-676

ALBERT L. FRANCE, ET AL.,
vs.
THE UNITED STATES.

No. 495.

BRIEF FOR PLAINTIFF IN ERROR.

JAMES C. CARTER,
Of Counsel.

ALBERT B. KING & CO., 106 WILLIAM ST., N. Y.

Supreme Court of the United States.

ALBERT L. FRANCE *et al.*

vs.

THE UNITED STATES.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

Statement of Case.

Plaintiffs in error were convicted at the February Term (1896) of the District Court of the United States, within and for the Southern District of Ohio and Western Division, of violating section 5440 of the Revised Statutes of the United States which makes it a criminal offense to conspire to commit an offense against the United States.

The overt act which they were charged with having conspired to commit was the causing to be carried from one State to another, to wit., from Covington, Kentucky to Cincinnati, Ohio, certain "papers, certificates and instruments purporting "to be, and representing the chances, shares and "interests in the prizes which, by lot and chance, "might be awarded to persons (to these Grand "Jurors unknown) who might select the numbers "which, by lot and chance, should be included in "the twelve numbers drawn and selected, as here-

" inafter stated, at the drawings of the so-called " Kentucky Lottery, and the so-called Henry Lot- " tery," &c.

Sentences of fine and imprisonment were pronounced upon the convictions and a writ of error was sued out by the defendants. The overt act charged as criminal was alleged to be such because it was a violation, as was charged, of the first section of the act passed March 2, 1895, entitled "An " Act for the suppression of lottery traffic through " national and interstate commerce and the postal " service, subject to the jurisdiction and laws of " the United States, and was as follows :

> " Be it enacted by the Senate and House of " Representatives of the United States of " America in Congress assembled. That any " person who shall cause to be brought within " the United States from abroad, for the pur- " pose of disposing of the same, or deposited " in or carried by the mails of the United " States, or carried from one State to another " in the United States, any paper, certificate, " or instrument purporting to be or represent " a ticket, chance, share or interest in or de- " pendent upon the event of a lottery, so-called " gift concert, or similar enterprise, offering " prizes dependent upon lot or chance, or shall " cause any advertisement of such lottery, so- " called gift concert, or similar enterprise, of- " fering prizes dependant upon lot or chance, " to be brought into the United States, or de- " posited in or carried by the mails of the " United States, or transferred from one State " to another in the same, shall be punishable in " the first offense by imprisonment for not more " than two years, or by a fine of not more than " one thousand dollars, or both, and in the " second and after offenses by such imprison- " ment only."

The objection was taken in various forms at the trial, by motion to acquit, and, after verdict, by motion in arrest of judgment, that the first section of the act above mentioned was invalid as being in violation of the Constitution of the United States, and the denial of the motions to acquit and to arrest judgment were assigned as error. It is the purpose of the following brief to support those assignments.

First Point.—It is a fully sufficient ground for declaring the statute under notice unconstitutional and void to point out the fact apparent and undeniable on the face of the act that Congress, in passing it, *had no other motive or purpose* than to protect the internal morals and welfare of the several States by relieving them from the supposed evils of lotteries. If, in *form* and *appearance*, the act is an exercise of the power to regulate commerce, it was a *perversion* and *abuse* of that power.

1. The design of the Constitution of the United States in adopting the bold and novel expedient of admitting two sovereignties to exercise their power in and over the same territory, was that certain *objects* should be accomplished by one of the sovereignties, and certain other and distinct objects, by the other. This was sought to be effected by giving certain legislative powers to Congress in order to effect the one class of objects, and leaving the residue of legislative power in the States to enable them to accomplish the other.

Now it so happens—this is unavoidable—that the exercise of the powers thus committed to Congress may have an effect upon interests which were intended to be left wholly to the States, or that the exercise of powers reserved to the States may have some effect upon interests designed to be entrusted solely to the general government. If in either of the cases supposed the *purpose* of the Legislature was only to carry out the object entrusted to *it*, and the effect of its action upon interests not intrusted to it was incidental only, even if necessary, there is no departure from constitutional action. But if the purpose of the Legislature, while in *form* and *appearance* exercising a power conferred upon, or reserved to itself, was to reach and control an interest wholly entrusted to the other sovereignty, it is a perversion and abuse of power, and just as unconstitutional as if the power itself had not been conferred. In other words, in our American system no powers of legislation are held either by the general or the State governments, for *any and every purpose*, but only to carry out the *ends* for which they were entrusted.

Were the case otherwise the rival sovereignties would be continually encroaching one upon the other, and constitutional law would be in large measure an illusion.

a. An apt illustration of this view is found in the case of State laws in relation to immigration, pilotage and quarantine. Undoubtedly these have an incidental, but necessary, effect upon commerce ; but if their real object was only to protect the State against the necessity of supporting paupers, or to facilitate its internal business, or to guard against the introduction of disease, they are valid enactments. If, however, the real *object* was to control commerce in some particular, they are invalid, although, in *form* and *appearance*, they may be an exercise of powers reserved to the States.

In the City of New York *vs.* Miln (11 Pet., 103), a law passed by the Legislature of New York, requiring masters of vessels to give bonds to indemnify the State against the expense of supporting pauper immigrants, was held, though against weighty dissent, to be constitutional. It did not seem to be anything but a provision designed in good faith to protect the State.

In the Passenger Cases (7 How., 283), the validity of another act of the State of New York, as well as one of Massachusetts, which required the payment of a fixed sum for every passenger landed, was challenged, and held to be invalid on the ground, mainly, that such an exaction from every passenger, whether likely to become a charge or not, went beyond the mere exercise of the police power of the State, and imposed a burden upon foreign commerce.

The State of New York thereupon passed another law, designed to obviate this objection, which required the giving of bonds of indemnity only, a thing not found objectionable in the case of the City of New York *vs.* Miln (*supra*) ; but it allowed the masters of vessels, if they chose, to escape this burden by paying a fixed charge for each passenger. The money thus paid was to be devoted to the indemnification of the State against the expense of supporting pauper immigrants.

This act was held to be unconstitutional by a unanimous Court; and the ground was that it was plain that the statute was so framed as to make it preferable for the master to pay the money instead of giving the bond, and was thus but a *roundabout* way of exacting the money. Said Mr. Justice MILLER, in giving the opinion of the Court: "In whatever language a statute "may be framed its *purpose* must be "determined by its *natural and reasonable effect*, and it is apparent that the "*object* of this statute, as judged by that "criterion, is to compel the owners of "vessels to pay a sum of money for every "passenger brought by them from a "foreign port."

2. But how are we to know the motive and purpose of Congress, or of the Legislature of a State (for the same rule must be applied to each) in any particular enactment? Are we at liberty to resort to extrinsic evidence of this? It has been held that we are not, but that we are confined to the face of the law itself. If the legislation appears to be in any way *conducive* to an end entrusted to the body enacting it, it is, so far at least, valid; but if it is conducive to no such end, but wholly to an end committed to the rival

sovereignty, it has no validity, for Legislatures, as well as men, must be held to *intend* the necessary consequences of their acts.

In Minnesota *vs.* Barker (136 U. S., 313), it was held that, "In whatever language a statute may be framed, its purpose must be determined by its natural and reasonable effect; and the presumption that it was enacted in good faith, for the purpose expressed in the title, cannot control the determination of the question whether it is or is not repugnant to the Constitution of the United States."

a. One of the most celebrated judgments of Marshall lays down this doctrine. No *express* power had been bestowed upon Congress to create a bank. Whether that body possessed it as an *incident* was the main question. That great Judge discarding the view that any rigorous interpretation was to be placed upon the term "*necessary*," but at the same time insisting that the means resorted to in the attempted execution of an *express* power should be such as might reasonably be supposed to conduce to that end, drew up the formula which should guide the judicial inquiry in language which has never been found to need amendment: "Let the end be " legitimate, let it be within the scope of " the Constitution, and all means which " are appropriate, which are plainly " adapted to that end, which are not pro" hibited, but consist with the letter and " spirit of the Constitution, are constitu" tional."

Mc Culloch *vs.* The State of Maryland,
12 Wheat., 316, 420.

b. And the same ground is well illustrated by the case of U. S. *vs*. Fox (95 U. S., 670), involving, not State, but national Legislation. In this case the validity of that provision of the bankrupt law (Sec. 5132 of the R. S.), which made it a penal offense for any person to obtain goods or chattels on credit three months before proceedings in bankruptcy by or against him, on the false pretense of dealing in the ordinary course of trade, was challenged. It was held invalid, because there was in such an act *no relation* to the execution of the power committed to Congress to establish a system of bankruptcy. Says Mr. Justice FIELD, in giving the opinion of the Court: "Any act commit-"ted with a view of evading the legis-"lation of Congress passed in the execu-"tion of any of its powers * * * "may properly be made an offense against "the United States. But an act com-"mitted within a State, whether for a good "or a bad purpose, or whether with an "honest or a criminal intent, cannot "be made an offense against the "United States, unless it have *some* "*relation* to the execution of a "power of Congress, or to some matter "within the jurisdiction of the United "States" (p. 672). An exact syllabus of this decision would be *that Congress cannot make any act a crime, unless it is in some manner "necessary or proper," in the execution of its own powers to do so.*

The case of the United States *vs*. Reese (92 U. S., 214) is also illustrative. The fifteenth amendment provided that the right of the citizens of the United States to vote should not be denied or abridged by the United States, or by any State, on account of race, color, or previous condition of servitude; and power was conferred upon Congress to enforce this article by "appropriate legislation." Congress enacted a law, which provided, in substance, that offers by a voter to perform any prerequisites to the right to vote should be deemed, in case of wrongful refusal by election officers to accept the offer, a performance; and the subsequent refusal to accept a vote was made a penal offense. This was held not to be "appropriate legislation;" because it went further than was necessary or proper to carry out the power committed to Congress, and made acts offenses which might not have denied the suffrage on the ground of race, color, or previous condition of servitude.

The same method of judicial inquiry was approved and followed in Dent *vs.* West Virginia (129 U. S., 114). The question arose whether the Legislature of that State had the authority to prescribe certain qualifications for physicians. The right of the State to protect society by requiring some qualification was regarded by the Court as unquestionable; but it did not doubt that this right was subject to limitations, and viewed the question of the constitutionality of any particular legislation as turning upon the inquiry whether it was *appropriate* to the end. Said Mr. Justice FIELD, in giving the opinion of the Court: "The "nature and extent of the qualifications "required must depend primarily upon "the judgment of the State as to their "necessity. If they are appropriate to "the calling or profession, and attainable "by reasonable study or application, no "objection to their validity can be raised "because of their stringency or difficulty. "*It is only when they have no relation to "such calling or profession*, or are un-"attainable by such reasonable study and "application, that they can operate to de-"prive one of his right to pursue a lawful "vocation."

And the case of Cummings *vs.* The State of Missouri (4 Wall., 277), is also in point. In that case the validity of provisions of the Constitution of Missouri, exacting a rigid oath of loyalty as a *qualification* for voting, holding office, &c., was challenged. The Court did not question the right of the State to exact *qualifications* for the discharge of public functions, but, looking into the oath in question, it found it to be not really of the nature of a qualification, and therefore condemned it. Said Mr. Justice FIELD, in giving the opinion of the Court: "Qualifications relate to "the fitness or capacity of the party for a "particular pursuit or profession." And, after discussing some of the acts which the party was required to swear he had not been guilty of, he added: "It is manifest "upon the simple statement of many of "the acts, and of the professions and pur-"suits, *that there is no such relation be-"tween them* as to render a denial of a "commission of the acts at all *appropriate* "as a condition of allowing the exercise "of the professions and pursuits" (pp. 319, 320).

And in *ex parte* Garland (4 Wall., 333), an Act of Congress of a similar character was declared unconstitutional on the same grounds.

c. And to the like effect also are the cases arising upon the municipal ordinances of San Francisco in relation to the carrying on of laundries. In the cases of Barber *vs.* Connolly (113 U. S., 27), and Soon Hing *vs.* Crowley (*Ib.*, 703), ordinances forbidding work to be done in laundries in certain places, from ten at night to six in the morning, were held unobjectionable, for the reason that they appeared, *on the face*, to be not unreasonable police regulations for the protection of the good order and peace of the community. It may have been that the real object was to disfavor the Chinese, but the Court would not indulge this supposition when nothing upon the face of the ordinance warranted it. But when a different ordinance was framed, forbidding the carrying on of laundries in San Francisco without the consent of the supervisors, and its validity was challenged, it was promptly condemned, on the ground that it did not provide for anything in the nature of *regulation*, but gave an *arbitrary* authority to the supervisors to grant or deny what should be a common privilege (Yick Ho *vs.* Hopkins, 118 U. S., 356).

d. So also in those cases where, under State laws, wharfage is exacted, this Court has made the question of their validity turn upon whether they were *really intended* to fix a reasonable compensation for that facility, or to impose an exaction upon commerce. Said Mr. Justice MILLER, in giving the opinion of the Court: "In "all cases of this kind it has been repeat-"edly held that, when the question is "raised whether the State statute is a "just exercise of State power, *or is in-*"*tended as a roundabout means to invade* "*the domain of Federal authority*, this "Court will look into the operation and "effect of the act to discern its purpose." (Morgan *vs.* Louisiana, 118 U. S., 455, 462. See also Ouachita Co. *vs.* Aiken, 121 U. S., 488.)

e. The numerous cases upon the validity of State laws imposing license fees upon traders, drummers, agents, etc., furnish other illustrations of the same doctrine.

f. We close these citations with an extract from a recent decision of this Court, already cited, which presents a striking instance of the necessity which this Court has recognized of scrutinizing the *purpose* of a law with the view of determining whether it was designed to carry out an acknowledged power of the legislature, or to accomplish an end which was beyond its powers. In 1889 the State of Minnesota had passed a law providing for the inspec tion of meats before the animals were slaughtered, and its validity was attacked on the ground that it tended, and was designed, to impose a burden upon interstate commerce. It has always been conceded that the passage of laws providing for the inspection of food, &c., was clearly within the powers of State legislatures, and although there was nothing upon the face of this statute which in terms operated upon interstate commerce, this Court did not hesitate to say that it was designed to operate upon that commerce, and was consequently invalid. (Minnesota *vs.* Barber, 136 U. S., 313.)

Mr. Justice HARLAN in giving the opinion of the Court, after referring to prior cases, which had been hereinbefore cited, employed very happily conceived language :

> " Upon the authority of those cases, and
> " others that could be cited, it is our duty
> " to inquire, in respect to the statute
> " before us, *not only whether there is a*
> " *real and substantial relation between*
> " *its avowed objects and* the means
> " devised for attaining those objects, but
> " whether by its necessary or natural
> " operation it impairs or destroys rights
> " secured by the Constitution of the United
> " States " (p. 320).

g. It would, of course, as already intimated, be entirely repugnant to the spirit of the Constitution, and to the equality of the States and the general government in their respective spheres of sovereign action, if the same rule were not applied in determining the validity of a congressional enactment. The same rule has always been applied to each case.

3. Proceeding to examine this statute in the light of the above doctrines, it is immediately manifest that if it be, in *form* and *appearance* even, an exercise of the power to regulate commerce, *that* thing is no part of its real purpose; but that its real purpose and motive are to usurp the police powers of the States over internal morals.

a. It is absolutely no part of the motive or purpose to protect or benefit in any way, either foreign or interstate commerce. The mere carrying of lottery documents from one State to another, or bringing them from abroad, has no bearing or effect whatever upon commerce. It relieves it from no burden, furnishes no additional motive for it, facilitates it in no way, and commerce both foreign and interstate would proceed after its enactment precisely as before.

b. It accomplishes precisely what a similar statute enacted by the several States would accomplish and no more. Any State would have indisputable power to enact both that no lottery documents should be brought into it, or carried out of it, which is all that this statute enacts.

c. Legislation upon commerce, whether foreign or interstate, must relate and be confined to either (1) *the highways of such commerce*, that is, either the sea or the navig able waters of the country, or the public land highways, such as the roads and railways when used for interstate transportation; or (2), the *instrumentalities* of such commerce, such as ships or land vehicles (when used in interstate commerce); or (3), the *agents* of such commerce, such as carriers when engaged in carrying it on; or (4), the *subjects* of such commerce, such as articles of trade and merchandise when set apart and destined for foreign or interstate transportation, or their documentary substitutes.

Commercial intercourse, which is the broadest definition of commerce ever laid down, embraces the above-enumerated matters and them alone. This act neither relates to or affects either of them. It is aimed at no ship, no highway, no carrier, no article that is bought and sold.

d. If a doubt could be started as to any one of the above particulars it would be as to an article of trade which could be bought and sold, and it might be suggested that a lottery ticket could be bought and sold; but it is needless to consider this, for the provisions of the act extend even to any *advertisement*, that is, any written or printed information of a lottery.

e. It forbids the *mere* carriage from one

State to another of any of the documents referred to in it, not by any ship or land conveyance, or over any highway of commerce; but in any way whatever, so that if a man should carry one of the papers in his pocket through the fields across the boundary line between two States he would incur the penalties of the act. Nor, so far as interstate transmission is concerned, is it requisite that the papers should be carried for the purpose of disposing of them to others; but the penalty would be incurred if a man should carry them pursuant to instructions to put them in the fire on the other side of the line.

Second Point.—But the statute is unconstitutional and invalid, irrespective of the purpose and motive with which it was passed. It is not even in *form* and *appearance* an exercise of the power to regulate commerce; but of the police power reserved to the States of protecting their interior morals and welfare.

1. It will not be pretended that there is anything in the circumstance that papers or documents relate, in some manner, to *lotteries*, which gives to them a *commercial* character, so as to enable Congress to prohibit the carriage of them from one State to another, when it would not, or might not, have the power to prohibit such carriage of other things. If Congress has the right to

prohibit such carriage of lottery documents, it can only be because it has the power to prohibit such carriage of any tangible thing whatever. And inasmuch as the prohibition is not limited to carriage on any navigable waters of the United States, or any public *highway* of commerce, nor by any ship, car, or other vehicle employed as an *instrumentality* of commerce, nor by any carrier or other *agent* of commerce, nor for any *purpose* such as *sale*, or other disposition, the power assumed to be exercised by Congress in enacting the law is a power to prohibit the carriage from one State to another of any tangible thing in any manner whatever, over highways, or through fields, and for any purpose whatever. If it be said that Congress would not have the power to prohibit such carriage of *innocent* things, for the reason that it would be a deprivation of fundamental rights, the above statement may be qualified by adding to the word "prohibit" the qualification of "or to regulate" as by requiring a license, or imposing some other condition.

In short this legislation assumes that *the mere carriage in any manner, for any purpose, of any tangible thing across the boundary line separating two States is commerce!* And unless this precise proposition can be made out the statute cannot be defended.

a. According to this if a man going from one State to another, happened to take with him in a trunk, bag or other receptacle, or even in his pocket any tangible things documentary or other, this would be commerce in such things, and whether he went by rail, wagon, or on foot, or over a highway, or through fields.

b. If a man removed his home from one State to another, even though the distance were less than a mile, and took his household goods and chattels with him, it would *be commerce* in those things.

c. If *persons* could be regarded, as they have sometimes been thought susceptible of being regarded, as imports and exports, the visit of a young man to his home in another State to spend Thanksgiving would be *commerce.*

d. It may be argued that "commerce" has been defined as "*intercourse*," and that if this be correct any communication between different States is interstate commerce. This definition has, indeed, been frequently given, and its author was Marshall, but he did not commit the absurdity of saying that *all* intercourse was commerce. He said: "Commerce, undoubtedly, is traffic, but it is something more: it is intercourse. It describes the *commercial* intercourse between nations and parts of nations in all its branches, and is regulated by prescribing rules for carrying on that intercourse." (Gibbons *vs.* Ogden, 9 Wheat., 1); and, while this definition has been many times adopted, it has always been with the qualification limiting it to *commercial* intercourse. Surely it does not embrace family or social intercourse.

e. It might be asked whether if one man hired another to transport goods for him from one State to another, it would not be commerce, even though the transportation was by a private vehicle and through the fields. Undoubtedly it would be commerce if the purpose were a *commercial* one ; that is to say, if it were connected with the purchase, sale or exchange of them, and not otherwise. But, however, this might be with *articles* of commerce, it certainly would not be with such things as lottery documents which are not articles of commerce. What articles of commerce are has been determined by this Court. They are *such* things as have a value in themselves and are bought and sold in the way of trade. Such things as policies of insurance whether fire or marine are not articles of commerce ; and still less can lottery documents advertisements, &c., be such.

Paul *vs.* Virginia, 8 Wall., 168, 183.
Hooker *vs.* California, 155 U. S., 648.

2. There is nothing in the decision *in re* Rapier (143 U. S., 110), at all conflicting with anything above argued. In that case the question was as to the constitutionality of a law excluding lottery matter from the *mails*. The law acted upon a physical instrumentality within the exclusive legislative power

of the general government, and it was held that the States in surrendering to the United States the exclusive control of the mails surrendered it in as perfect a manner as they, before the constitution was adopted, possessed it ; and that as, prior to the surrender, the States could have exercised the challenged power, and could not afterwards, the general government could exercise it.

But in relation to the present statute there has been no such surrender, and the State legislatures may unquestionably enact just such a law. They would not, however, prefix such a title to it.

Third Point.—But the statute in question is invalid, not only for the reason that none of the powers conferred upon Congress were sufficient to authorize it, but also because Congress was, by an *express restriction upon the exercise of those powers*, prohibited from making such a law. It assumes the power to declare what printed or written matter shall be carried from one State to another, not only by the mails, *but in any way or manner whatsoever.* It is, therefore, a law "abridging the freedom of the press" within the meaning of the First Amendment.

I.—It is important to keep in mind throughout this discussion, that the constitutional safeguard thus invoked is not so much a limitation upon the *express powers* enumerated and granted to Congress, as it is a restriction upon the *legislative means* to be employed in the exercise of those powers. Speaking with precision, it is a restriction upon the *incidental* powers which Congress may exercise in carrying out its express powers. When read, as it should be, as a part of the Constitution, it is as if the Seventeenth clause of the Eighth section of Art. I, contained these words. The Congress shall have power "To "make all laws which shall be necessary and "proper for carrying into execution the fore-"going powers, and all other powers vested by "this Constitution in the Government of the "United States, or in any department or officer "thereof; *provided, however,* that it shall "make no law abridging the freedom of the "press."

The argument, therefore, upon which we are now entering is to the effect, that if the power of thus prohibiting the circulation of printed and written matter be regarded as incidental to the power to regulate commerce, Congress is prohibited by the First Amendment from exercising it.

II.—Any discussion of the question, whether an enactment of Congress abridges the "Liberty of the Press," should properly start with a clear statement of what that phrase imports, or rather what it imported at the time of the adoption of the Federal Constitution, for it was the particular Liberty of the Press which then existed, which was, and is, protected by the constitutional safeguard.

Our proposition is, that this Liberty of the Press *imported the liberty of free discussion in print, without any restraint, save that which was imposed by the law of libel as it then existed in the jurisprudence of England and her American Colonies.*

1. The primary meaning of *liberty* is *exemption from restraint;* and absolute liberty imports entire freedom in the individual to do whatever he pleases. Such absolute liberty does not exist in any form of society, either civilized or barbarous. The very existence together of more than one individual brings with it some restraint, either of force or fear.

   The actual Liberty of the Press, which the constitutional safeguard secured, was the liberty of discussion in print, qualified and limited by those restraints which society had ascertained and declared to be necessary to social peace and order.

2. The inquiry, then, becomes what were the restraints which, at the period in question, could be imposed upon the liberty of free discussion in print. These cannot be justly apprehended without some brief examination into the nature, the importance, and the history of free discussion.

   It will at once become manifest that we are dealing with a subject which, so far as concerns free government, transcends every other in importance.

a. In most human societies, if not in every one, there are found two oppposing tendencies ; one on thē part of those in power to preserve the existing state of things, which is to preserve their own supremacy ; the other on the part of those who are governed, to reform and improve as they think, the existing condition. It matters not whether the government is absolutely despotic, or in the hands of an aristocracy, or in those of a majority, as in a republic. The opposing tendencies, though operating with different degrees of activity, are, in each case, present.

c. Government is but the exercise of *power*. And this is true whether the power is arbitrary and despotic, or limited by custom and tradition, or, by constitutional forms, to the enactment and execution of regular laws. Its essential nature is *restraint*.

d. Every despot identifies government with himself ; and views any attack upon himself as an assault upon the State. The *disposition* is the same in the freeest of States. Those in office, and the majority which they represent, are apt to think that the safety of the State depends upon their retention of the sovereign power. It is less apparent, but really true, that in republics, as well as despotisms, all attempts to undermine the authority of the governors are viewed by them as offenses, and will be met with as great an exercise of repression, either arbitrarily or by law, as those in authority may think it safe to exercise. The spectacle of a party in a republic seeking by an exercise of the power it has gained to intrench itself in its position is entirely analogous to the arbitrary persecution by a despot of his supposed enemies.

e. All government rests upon *opinion*. This is as true of despotisms as of republics; although the former are less sensitive to opinion; and it is, if not theoretically acknowledged, tacitly felt, by all governments. And hence, all governments, whether temporal or spiritual, have viewed *free discussion*, which creates, concentrates and consolidates opinion, as a menace to their existence, and have conscientiously regarded it as a duty to repress it.

f. The conflicts thus engendered have resulted in the most bitter persecutions and the most devastating wars; all the more bitter and devastating from the fact that the combatants on each side have been equally sincere and equally confident that the salvation of society depended upon their success. The overthrow of one set of rulers has been succeeded by the elevation of another equally intolerant, and equally ready to employ the same arts of repression which had been exerted against themselves.

g. But for some centuries there have not been wanting enlightened minds who have perceived that such an exercise of the powers of society was not consistent with the advancement of truth, either in morals, religion or government; and that some other solution must be found for the question how far the right of free discussion should be limited and restrained.

That solution was found a century and more ago by Great Britain, in the thorough establishment of the doctrine of the Liberty of the Press, as explained in the proposition stated under subdivision II of the Third Point of this brief, and it has been accepted by the States and Colonies, of which she has been the parent. It has been acknowledged and accepted to some imperfect extent by other European nations, but can hardly be said to have become incorporated into the fundamental law in any of them. The extent to which this solution is acted upon by any State, marks the degree of its freedom and civilization, and its capacity for progress.

III.—Liberty of the Press, as thus understood was, as all great achievements are, the fruit of a long struggle, in which there may be discerned two successive principal stages, in each of which the principle received a distinct enlargement and more exact definition. It is of much importance, to a just apprehension of the principle, that this gradual development should be studied.

1. The first stage of this development was

marked by the abrogation of all *censorship* of the press, which left men free to print and publish their opinions without *previous* restraint.

a. The application of the art of printing furnished a new and prodigious instrumentality for creating, consolidating and disseminating *opinion ;* and consequently for attacking government, religion, and all establishments resting upon opinion. The disposition to employ repressive power, always natural to those who are the custodians of it, was everywhere yielded to, and the most effective form of repression—that which acted *beforehand*, and directly *prevented* the obnoxious practice—was resorted to, not only under despotic governments, but even in England.

This authority was asserted under the form of a *censorship*, or *previous* restraint, and permitted nothing to be printed except such matter as had been *allowed* by the censor, and made provision for the summary search, seizure and destruction of unlicensed works, and of the presses, materials, etc., employed in printing them.

b. This power seems originally to have been exercised by the Crown itself ; and in two forms—*first*, by the prohibition of printing anything not allowed by the licensor ; and —*second*, by vesting the exclusive privilege of printing, even under these restrictions, in a few favored grantees, the two Universities, and the Printers' aud Stationers' Company of London. At a subsequent period it was lodged in a body every way fited for such a purpose—the Star Chamber. It was asserted by the Long Parliament during the vacancy on the Throne, and, after the Restoration, was again vested in the Crown by Acts of Parliament.

For an account of the origin and nature of the censorship the following authorities may be consulted :

May, Con. Hist. of England (N. Y., 1874,) vol. 2, Art. IX., pp., 102–106.
Entick *vs.* Carrington, 19 How. St. Tr., 1029.
13 & 14 Car. II., c. 33.
Scarlett, *arg.* Rex *vs.* Burdett, Lord Abinger's Mem., p. 297.
Erskine's speech for Thomas Carnan (Speeches, Lond. 1810, vol. 1, p. 38).
Dicey's Law of the Constitution (Lond. 1886, p. 274.)
Odgers' Libel and Slander, (2 Lond. Ed., 10.)
Paterson, Liberty of Press, Speech & Worship, 38–61.

c. A prerogative of this nature, involving as it did the destruction of property and the deprivation of personal rights without previous accusation, trial and conviction, committing the determination of the most important questions to the arbitrary decision of a man who would necessarily be but the tool of those who appointed him, was wholly inconsistent with the fundamental principles of English liberty then beginning to assert themselves. It was inevitable that sooner or later it would be deliberately challenged and overthrown.

An order of the Long Parliament in 1648 drew from John Milton his "Areopagitica," in which he defended the liberty of unlicensed printing with all the power and splendor of his genius.

d. Limited in their operation to the period prescribed in them, it was necessary to the continuance of the restrictive policy that the censorship laws should be from time to time renewed, and the growing antipathy to them naturally expressed itself in opposition to the attempts at renewal.

A select committee of the House of Commons was appointed in 1695 to report what temporary acts then about to expire should be renewed; and it reported in favor, along with others, of the act creating a censorship of the press; but when the vote of the House was taken on this recommendation it was decided in the negative. The Lords sent back the bill, containing other temporary acts, with an amendment embracing the one thus rejected; but the Commons refused to concur, and, upon a conference, the managers on the part of the Commons delivered to the Lords a weighty report condemning the whole system of censorship, and the Lords yielded.

This report dwelt more upon the incidental evils of the system of licensing, such as jobs, exactions, seizures, domiciliary visits, &c., than upon the general advantages of free discussion, and in this the historian Macaulay finds matter to gratify his love of paradox.

"Such," says he, "were the arguments which did what Milton's Areopagitica had failed to do." But it would be a mistake to suppose that that immortal plea for the freedom of thought, speech and the press had then passed from the minds of men.

This action of Parliament is declared by the same historian to have "done more for liberty and civilization than the Great Charter, or the Bill of Rights." (Macaulay's Works, New York, 1866, vol. 4, pp. 124–126.) That it was this action which constitutes the *beginning* of the era of the Liberty of the Press in England is everywhere agreed.

2. It was, however, but the beginning. Free discussion may be restrained as well by *subsequent punishment*, as by *previous restraint*. It is, in either case, only *the fear of punishment* which operates to prevent men from publishing what they may have a desire to publish. And this fear may be created as well by annexing penalties to the *publication* of writings in some manner *specified* and *described*, as by forbidding the publication of *unlicensed* writings under similar penalties.

The *censorship* had fallen almost upon the first deliberate attack. It was far otherwise in respect to the question of *subsequent punishment*.

It was agreed upon all hands that no man could be punished for publishing any writing unless it was what the common law as it then stood denounced as *libellous*. But the momentous question arose in whom was the power lodged of ultimately determining whether a publication be libellous. If it were reposed in a select magistracy created by, and dependent upon, the arm of power, a restraint might be re-established quite as tyrannical and effective as the censorship. If it were committed to ordinary juries taken from the body of the people and exercised under all the safeguards of a regular jury trial, the largest possible measure of freedom would be secured. The advocates of privilege and prerogative—the *possessors* of power—naturally took the first position. The advocates of freedom asserted the second. After a memorable contest which "shook the foundations of Westminster Hall," and was carried into Parliament, the latter obtained a complete and final triumph. *And this marks the second stage in the struggle* for the liberty of the press.

May's Const. Hist. of England, Vol. 2, pp. 108, 122.

a. There were two ways in which after the fall of the censorship a restraint more or less effective might have been asserted. One was by a legislative change in the common law of libel. Parliament might have enacted that any publication calling in question the powers of magistrates or other public officers, or the authority of the established church, or advocating certain designated views upon morals or government, should be deemed libels. Such laws would theoretically, at least, and, in most cases, in fact, have required juries to find publications to be libellous which would before have been held innocent. Such attempts seem never to have been made in the British Parliament. Probably, at no period subsequent to the revolution would they have been successful.

The other method was by asserting that the question whether a paper is libellous is a question of *law* to be determined by the Court, whose instruction the jury is bound to accept, confining itself to the question of *publication* alone. This is substantially clothing the Judges with the same power which, as above indicated, the Legislature might assert.

b. As already indicated the partisans of power and restraint accepted the latter method. There were divers reasons for this preference. It would not arouse the opposition which might be excited by attempts to *change* the law. The decisions of the Courts are not enactments, but declarations of what the law *is*. Moreover, there were plausible grounds upon which such a view might be defended. The construction and import of writings is, in general, a question of law. And at this period, although the precedents were not uniform, there were some at least, if not a majority, in accordance with the view. And finally this doctrine did not, on its face, *appear* to assail the liberty of the press. Those who advocated it could still agree with their opponents, that a man might publish with impunity anything which at common law was not a libel.

c. But the whole question of the freedom of the press, was wrapped up in the question whether the ultimate decision be lodged with the Judge or the jury. If with the former, that freedom would be under the control of a fixed magistracy necessarily inclined to support the pretenses of power, and the same reasons which guided the action of the censorship, would be made the grounds of judicial determination. This truth became well illustrated in the course of the struggle with which we are dealing. The censorship act (13 and 14, Car. II., c. 33) was from time to time renewed down to 1679, when it was permitted temporarily to expire. The support of the pretenses of the Crown was then devolved upon the Judges ; and how thoroughly they were prepared to render that service may be seen by the doctrine declared by the twelve Judges, Scroggs, C. J., at their head, in Carr's case, 1680 (7 St. Tr, 929), that it was criminal at common law to write on the subject of government, whether in praise or censure ; "for no man has a right to say *anything* of government !" (See also, Entick v*s*. Carrington, 19 How. St. Tr., 1069-1071.) But if the decision were lodged with the jury, it would reflect the sentiment of the public, and consequently secure to the press that real freedom so essential in enlightened government.

d. That the real issue was of this nature was not, at first, distinctly perceived. The Judges naturally assumed the office of instructing juries what were libels and what were not, without, however, at first, insisting that it was not competent for the jury to pass upon that question themselves; but, finally, cases arising where it was feared that the juries might acquit contrary to the opinions of the Judges, the latter came to insist that the jury were concerned alone with the fact of publication and the truth of the innuendoes, and must leave the question of the character of the publication, as criminal or innocent, to the Court.

It was at once perceived by the liberal statesmen and lawyers of the time that this position, if established, rendered the liberty of the press an empty sound, and that the old doctrines of the censorship would be renewed under another form. Under the powerful influence of Lord Mansfield the twelve Judges were brought to something like an agreement in favor of this menacing doctrine; but the boldest spirits of the English Bar supported by the most distinguished statesmen of the time, Lords Chatham, Camden (himself an illustrious lawyer), Burke, Fox, Sheridan and others denounced it as an outrageous perversion of the ancient law of the realm.

e. The champion of the doctrine of restraint, Lord Mansfield, pronounced the first deliberate opinion on the question in the case of The King *vs.* Woodfull, in 1770 (20 St. Tr., 895). The trial had been before him, and in his charge to the jury he had delivered to them his opinion of the liberty of the press as follows: "As for the liberty "of the press I will tell you what that is; "the liberty of the press is that a man may "print what he pleases without a license; "as long as it remains so, the liberty of "the press is not restrained"! He then told the jury that the question of libel or not libel was not for them, and this charge was held correct by a subsequent decision of the Court on a motion for a new trial. But, soon after the trial, and before this decision had been delivered, the public mind had taken alarm at these doctrines and had found expression in a motion by Sergeant Glyn in the House of Commons for a committee to enquire into the proceedings. Upon this motion, in the course of a long debate, the Chief Justice was severely censured by the mover, as also by Dunning and Burke, and defended by the Attorney-General and by Thurlow, as well as by Charles Fox, who had not then arrayed himself on the popular side (Part First, 1211-1302).

He was also assailed in the House of Lords by Lords Chatham and Camden. After the delivery of his judgment in the King's Bench, he was formally attacked by the latter and challenged to debate the question. He at first seemed to accept the challenge, but finally declined and remained silent, to his great discredit, as Lord Campbell informs us.

Lives of the Chief Justices (New York),
Vol. 4, pp. 387-393, 485.

f. The judgment in The King *vs.* Woodfull had no effect in settling the question. It was again revived and made the subject of a great and memorable debate in 1784, in the case of The King *vs.* The Dean of St. Asaph, in which Erskine made the immortal argument which will forever stand as the finest union of perfect logic and fitting eloquence in the language. Drawing a just distinction between private and public libels, he asserted concerning the latter:

(1.) That the question of guilty or not guilty on an indictment could not in general be determined without determining the *intent* with which the writing was published; and that this had nothing in it resembling a question of *law*, but was a pure question of *fact*.

(2.) He exposed with pitiless severity the pretense that a verdict of guilty on an indictment for a libel, differing from a like verdict in other criminal cases, proved only the fact of publication, and left the question of guilt or innocence wholly undecided. He put it to the Court to answer these questions. If the jury have nothing to do with the question of libel or no libel, why have the Judges for a hundred years been so sedulous to expound to them that the publication was a libel? Why is a verdict of *guilty* asked for and given, if the question of guilt is withdrawn? How is it that where the indictment is laid upon a part of a writing or book, the jury is permitted to take into consideration the whole writing or book?

(3.) And he put it with unanswerable force that inasmuch as sentence and execution might immediately follow a verdict of guilty, the defendant would be punished without a trial, if, as Lord Mansfield had declared, the verdict of guilty left the question of guilt or innocence open.

(4.) He showed that the authorities, even in the King's Bench, had been far more uniform, and that the doctrine for which he contended had the support of the Judges in the great case of the seven Bishops, and of the commanding authority of Holt in Hutchin's case.

(Erskine's Speeches, Ridgeway's Ed., Lond., 1810, Vol. 1, p. 264 *et seq*).

The above are but a few among a multitude of arguments and illustrations with which the great advocate overwhelmed his adversaries.

The spectacle exhibited by Lord Mansfield in affirming the ruling of Butler, J., against the argument of Erskine was most pitiful (3 Term Rep., 428 n.) He made no attempt to answer it. He could make none with any show of success. He was obliged to admit that his doctrine that a verdict of guilty on a general plea of not guilty, left the question of guilt undetermined and was equivalent to a special verdict in other cases, was an anomaly in English law, and fell back for his support of his pretended anomaly, not upon any considered decision founded upon deliberate argument, but upon what he alleged to be the *understanding* of the Bench and Bar. He even asserted that this had been the general understanding among the leaders of the popular party, and in proof of his assertion, imputed to Pulteney the following lines as having been written by him in a ballad :

> " For twelve honest men have decided the cause,
> Who are judges of fact though not judges of law."

In truth, the lines in Pulteney's ballad, were precisely the reverse. They ran :

> " For twelve honest men have determined the cause,
> Who are judges alike of the facts and the laws."

(Lord Campbell's Lives of the Chief Justices, New York, Vol. 3, p. 450.)

f. This great argument of Erskine was printed at the time and widely circulated, and sank deeply into the public mind. It was never answered ; and it may safely be said that the general judgment of the profession ever since has been that Lord Mansfield's doctrine was a perversion, and not a declaration, of the English law. Lord Campbell pronounces it to have been "based upon a transparent fallacy" (Lives of the Chief Justices, New York, Vol. 4, p. 450). The conviction of the public mind, well established long before, was finally made thoroughly effectual in 1792 by the passage of the bill introduced by Mr. Fox, who had then become a convert to popular principles, which enacted in effect that in public prosecutions, while the Judges might declare their opinions as to whether a paper was a libel, the jury should have the right to pass upon the question in giving their verdict. This act purported to be, what it was in fact, simply declaratory of the pre-existing law. It was passed unanimously in the House of Commons, and by a large majority in the Lords.

g. The doctrine rests upon impregnable foundations in reason. When any charge is made against an *individual*, a fact is asserted, the *truth* of which may be tried, and, unless justified, or shown to be privileged, malice, and consequently guilt, must be imputed to the defendant. But what is called a *public* or *seditious* libel is not a charge against any *person*, but the assertion of something supposed to be detrimental to correct principles of morality or government. It is, therefore, an attack upon *opinions*, and can be nothing but *opinion* itself. And the question whether such publications are true or false, can never be matter of *law*, except under some government which undertakes to establish *by law* what truth is in respect to morality or government, and to forbid the expression of opposite opinions.

The modes in which men may express their opinions are as various as the natures of different individuals, and it is impossible to define bounds or limitations within which the expression may be confined.

But it is not doubted that publications may be made with *intent* to overthrow by unlawful means the institutions of government. These cannot be defended as expressions of opinion. They are not aimed to produce conviction. Obscene books and pictures, writings teaching what are universally acknowledged to be crimes, are not discussion and debate, and may doubtless be condemned, and the authors and publisher of them punished. There is a universal concensus to the point that social peace and order by means of government shall be preserved. This is necessary even to free discussion.

The question, therefore, must always be whether any writing charged to be libellous is an honest, *bona fide* attempt to express opinions really entertained, or a dishonest effort to inculcate vice and crime. Manifestly this must always be a question of *fact*, and of fact alone. The writing may be, and usually is, important *evidence* of the fact, but cannot supersede other evidence. The circumstances under which it was written,—the other parts of the paper not charged as libellous—the character and conduct of the writer—all these constitute information which may be laid before the jury to enable it to ascertain the vital and material fact of *intent*.

h. It follows as a corollary from the foregoing that there cannot be any further definition of a public or seditious libel, than that it is a publication intended to be hostile to government and to bring it into contempt. This may be said to be universally admitted, both by lawyers and statesmen. It has never been otherwise defined.

Lord Lansdowne, in H. L., 41 Parl. Deb., 7–15.
Protest of the Peers, *Ibid.*, 747.
Brougham's Contributions (London and Glasgow, 1856, vol. 3, p. 157).
Hamilton. (Croswell's Case, Works, New York, 1886, vol. 7, pp. 334, 343).
Sir James Mackintosh (Works, London, 1846, vol. 3, p. 249).

The impossibility of definition is well stated by Sir James Macintosh: "Those "who slowly built up the fabric of our "laws never attempted anything so ab- "surd as to define by any precise rule "the obscure and shifting boundaries "which divide libel from history or free "discussion. It is a subject which, from "its nature, admits neither rules nor defi- "nitions. The same words may be per- "fectly innocent in one case and most "mischievous and libellous in another. "A change of circumstances, often appar- "ently slight, is sufficient to make the "whole difference. These changes (which "may be as numerous as the variety of hu- "man intentions and conditions) can never "be foreseen or comprehended under any "legal definitions, and the framers of our "law have never attempted to subject "them to such definitions."

i. If the truth of doctrines may be evidenced by their salutary effects, no further defense of those above stated would be needed than a simple reference to history.

It is a melancholy task to peruse the criminal records of England while the doctrine of Lord Mansfield was enforced, and observe the chequered spectacle—a host of prosecutions instituted, often for the expression of the most innocent, or even laudable, opinions—verdicts extorted from juries against their will, and at other times juries defying the instructions of Courts. But since the passage of the Libel Act of Mr. Fox the scene is entirely changed. Prosecutions for public libel are extremely rare; and the notion that the existence of government or morality can be seriously threatened by any publication of mere opinions has been dismissed as a silly delusion.

3. The preceding discussion has made it clear that for more than twenty years immediately preceding the adoption of the Federal Constitution there were two rival views concerning the liberty of the press in England, one being that declared by Lord Mansfield, namely, that "a man may print what he pleases without a license," but at the risk of having what he prints declared by a fixed magistracy to be a libel and of being subjected to punishment therefor without the privilege of defending his innocence before a jury; and the other, that which vouchsafed to him this privilege, and which was well stated by Lord Kenyon as follows: "After "all, the truth of the matter, as to the lib- "erty of the press, is very simple when "stripped of the ornaments of speech, and a

" man of plain common sense may easily understand it. It is neither more nor less " than this: that a man may publish any" thing which twelve of his countrymen " think is not blamable, but that he ought " to be punished if he publishes what is blam" able. This, in plain common sense, is the " substance of all that has been said upon " subject." (Rex *vs.* Cuthill, 27 St. Tr., 675). If, as we have endeavored to show, Mr. Fox's act was but declaratory of the preexisting law, it is quite immaterial that the above definition was given some two years after the passage of that act.

The important question is, in which sense the term "Liberty of the Press" was employed in the First Amendment. The preceding discussion seems to relieve that question of doubt. How can we doubt that the framers of the Constitution themselves devoted to free principles of government, detesting the doctrines of arbitrary power, with the spectacle then actually before their eyes of the conflict going on in England between these rival views—a struggle in which all who had been their friends were upon the popular side—a struggle substantially finished by the triumph of that side—intended by the phrase "Liberty of the Press," precisely that liberty which was not only guarded by exemption from previous restraint, but defended by the safeguard of a jury trial?

4. But such a question can hardly be raised since the decision of this Court in Boyd *vs.*

The United States (116 U. S., 616). In that case the validity of the legislation authorizing the issuing of a warrant in revenue cases for the seizure of books was challenged and determined in the negative. The question was declared to turn upon the import of the language in the Fourth Amendment, "unreasonable searches and seizures," and in order to ascertain this, the Court, setting the example which we have endeavored to follow in this brief, went back to the struggle in England over the question of general warrants, which was terminated by the memorable judgment of Lord Camden in Entick *vs.* Carrington (19 St. Tr., 1029), and, declaring that that contest must have been familiar to the framers of the Constitution, did not hesitate to say that they must have entertained the same views which the lovers of liberty at that time entertained, both in England and in this country, and held the warrants to be illegal.

That struggle over general warrants of seizure was but a part of the struggle for the liberty of the press which has been herein recounted, as will be seen by a reference to Lord Camden's judgment; and the inference that the framers of the Constitution entertained the same views respecting general warrants as those declared by that great Judge is no clearer than the inference that by "Liberty of the Press" they intended the same liberty which, in that same struggle, he and the other advocates of popular rights asserted and successfully maintained. It cannot be that men who at that time thought it necessary to insert in the American Constitution provisions to forever secure the liberty of the press, designed simply to protect the press against a censorship. The censorship had been dead for a century, and there was no possibility or thought of reviving it. There had been two parties upon the question of free discussion. Its enemies took the ground that the liberty of the press consisted simply in the absence of a censorship. Its friends asserted that whether a publication is innocent or criminal, must be left to the determination of a jury. It must have been this view which the founders of the American Commonwealths, both State and National, determined to incorporate into the fundamental law.

5. But, in truth, while the obnoxious practice of issuing general warrants was but part of the system of restraint upon free discussion, and the First and Fourth Amendments were thus aimed at substantially the same abuse of power, it may be said with equal truth that *all* of the ten amendments proposed by the First Congress had the same common object. They contain a precise enumeration of all the principal doctrines which had been asserted by the popular party in England during the entire struggle against prerogative and power, and which together constituted what was then, and still is, known as Civil Liberty. Each one of them points to a particular liberty which had long been striven for, and stamps it as something which was to be forever thereafter deemed as finally secured and placed beyond future peril.

6. The contemporaneous exposition by those principally instrumental in the framing of the Constitution is in entire accordance with the foregoing views. It is nowhere better expressed than in Hamilton's masterly brief in the celebrated case of The People *vs.* Croswell, an indictment for a libel upon Thomas Jefferson, President of the United States.

"I.—The liberty of the press consists in the " right to publish *with impunity* truth, with " good motives, for justifiable ends, though " reflecting on government, magistracy or " individuals.

"II.—That the allowance of this right is " essential to the preservation of free gov- " ernment—the disallowance of it fatal.

"III.—That its abuse is to be guarded " against by subjecting the exercise of it to the " animadversion and control of the tribunals " of justice; *but that this control cannot " safely be entrusted to a permanent body " of magistracy, and requires the effectual " co-operation of Court and jury.*

"IV.—That to confine the jury to the " mere question of publication and the ap- " plication of terms, without the right of " inquiry into the intent or tendency, refer- " ring to the Court the exclusive right of " pronouncing upon the construction, ten- " dency and intent of the alleged libel, is " calculated to render nugatory the function " of the jury, enabling the Court to make a " libel of any writing whatsoever, the most " innocent or commendable.

"V.—That it is the general rule of criminal "law, that the intent constitutes the crime, "and that it is equally a general rule that "the intent, mind, or *quo animo*, is an inference of fact to be drawn by the jury.

"VI.—That if there are exceptions to this "rule they are confined to cases in which "not only the principal fact, but its circumstances, can be and are defined by statute, "or judicial precedent.

"VII.—That in respect to libel there is no "such specific and precise definition of facts "and circumstances to be found; that consequently it is difficult, if not impossible, "to pronounce that any libel is, *per se* and "exclusive of all circumstances, libellous; "that its libellous character must depend "upon intent and tendency, the one and the "other being matters of fact."

This precise and elegant statement of the law was supported by a luminous argument reviewing the whole law of libel and its history, showing that it was the ancient law, and that Mr. Fox's act was declaratory merely. It received the full assent of Kent, afterwards Chancellor, whose opinion contains a most elaborate scrutiny of the doctrine of Lord Mansfield, and declares that he and the Judges who followed him had "involved "themselves in inconsistency and paradox; "and I am induced to believe that it is a departure from the ancient, simple and true "history of the trial by jury in criminal "cases."

Hamilton's Works (N. Y., 1886), Vol. 7, pp. 333, *et seq.*

People *vs.* Croswell, 3 Johns. Cases, 336, 365.

7. The Alien and Sedition Law of 1798 contained provisions for the punishment of libels against the government which became the subject of violent controversy. These provisions were deemed unconstitutional by many of the most enlightened statesmen, including Madison, the author of the Report of the Virginia House of Delegates. Their unconstitutionality seems to have been conceded in the discussion herein referred to in the U. S. Senate in 1836. But no attempt was made by this statute to define what publications should be punishable so as to restrict the office or the power of a jury. The design simply was to make libels upon the U. S. Government punishable just as libels against the British Government had always been punishable at common law. This could not be done without the aid of an express statute, for the Courts of the United States have no common law jurisdiction in criminal cases (United States *vs.* Hudson, 7 Cr., 33). It could with great plausibility be argued that that government should not remain stripped of power to defend itself against any libel however seditious. And this law proceeded upon a full acknowledgment of the doctrine of the liberty of the press as herein maintained. It sought to lay down no new definition of the law of libel, but made that offense to consist in publications designed and tending to overthrow the government or bring it into contempt, thus making the *intent* an essential element of the crime. And, moreover, it allowed by express provisions, that the truth might be proved by way of

defense ; and *clothed the jury with the right to determine both the law and the fact.*

Act of July 14th, 1798. Stat. at Large, Vol. 1, page 596.

IV.—If the foregoing discussion has been in any degree successful, it has established that the phrase "Liberty of the Press," as employed in the First Amendment, imported that measure of liberty which permits, without previous restraint, the publication of any writing whatever, and without the restraint of any *subsequent penalty*, unless it should be found by a jury on a regular trial to be such a publication as the law then condemned as libellous.

The immediate purpose and effect of the amendment was to place this great safeguard of liberty beyond the peril of the exercise even of the *legislative* power.

1. The framers of our Constitution did not require to be taught that all safeguards for the protection of rights must be erected against the *possessors of power*, whoever they might be ; nor did they fail to perceive that the doing away with a monarch had no effect to destroy, but only to *transfer*, power. It was equally clear to them that in such a division as they proposed of legislative, executive and judicial powers, the Legislature would be the superior body, and encroachments from that quarter were most to be apprehended.

The Federalist, Nos. 48 and 49.

2. It was not from the executive or the judicial departments that they apprehended any invasions of the liberty of the press. They had left the former without any pretense for the exertion of a restraining authority ; and the latter, being in no manner bound to, or dependent upon, a permanent or hereditary sovereign, was quite unlikely to become united in any such endeavor. But the case was quite different with the Legislature. Its power would be wielded by a *majority*, which might easily be influenced to the adoption of questionable measures by a belief that its supremacy could thus be perpetuated. Striking directly at this danger, they thus framed their safeguard : "*Congress shall make no law* * * * * * abridging the freedom " of speech, or of the press." This bestowed upon the people of the United States a protection which could not be gained in Great Britain, and constituted the final stage in the security of the liberty of the press.

3. The result of the contest in England was to preclude *Judges*—the fixed and permanent magistracy—from making the question of the guilt or innocence of a publication a question of *law*, and taking it away from the jury by *judicial definitions* of what publications should be deemed libellous. Such definitions, however, may just as well be made by legislative *enactment*. That power Parliament still retained. But the framers of the Constitution went further and forever precluded Congress from making any such *legislative* definitions. Congress, therefore,

cannot *describe* any publication by any narrower description than *seditious*, *libellous*, or equivalent terms, and declare that the publications so described shall be *deemed to be* seditious, or libellous, and punishable as such.

And a very learned writer is of opinion that under free governments like ours there is no place for any system of repressing libellous publications except when made with intent to incite rebellion or civil war.

Cooley Const. Limitations, 526.

V.—Having determined the import of the term "freedom of the press," as employed in the First Amendment, we are now prepared for the main inquiry whether the statute in question is a law *abridging* that freedom. That such is its character is very clear.

1. That freedom includes not only the liberty of *printing*, but the liberty of *publishing*. The former would be empty indeed without the latter. And the liberty of *publishing* must be co-extensive with the liberty of *printing*. And what is *publishing?* It is the *communication to others* of what is printed; in other words, it is *circulating*. *Publishing* and *circulating* are admitted to be synonymous (*Ex parte* Jackson, 96 U. S., 727). And what was the liberty of *publishing*, which existed at the time of the adoption of the Constitution? It was the liberty of *cir-*

culating printed matter in all practicable forms.

2. The case of *ex parte* Jackson (96 U. S., 727), by its reasoning, seems effectually to determine that the statute under notice is invalid upon the ground now asserted. That decision proceeded upon the view that Congress had the right to refuse the facilities of the mails to lottery matter, but it fully conceded that it could not prohibit the circulation of such matter in other ways (p. 735).

3. It may perhaps be urged that the statute does not apply to printed matter generally relating to lotteries, but only to papers purporting to be, or represent *tickets*, or chances, and to advertisements of lotteries.

   But will it be claimed that this prohibition of the carriage of advertisements, which are ordinarily contained in newspapers, is not an invasion of the liberty of the press?

Lastly.—The judgment should be reversed, and a new trial ordered.

JAMES C. CARTER,
Of Counsel for Plaintiffs in Error.

164-676

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164-676

Supreme Court of the United States

ALBERT L. FRANCE *et al.*,
Plaintiffs in Error,

vs.

THE UNITED STATES.

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Observations in reply to the brief of the defendant in error.

First.—The first proposition made in this brief is that the law challenged is *presumptively* constitutional.

We shall not undertake to controvert this proposition, but a caution should be interposed against the allowing of much weight to it. It is apparently introduced here for the purpose of leading to the conclusion that if the statute in question is subject to *doubt*, it should be held to be constitutional, for the reason that a statute is not *clearly* unconstitutional where it is doubtful whether it is constitutional or not. But when *doubtful* questions are raised, it is the proper business of Courts to resolve the doubts, and not to dispose of cases by presumptions. The practice of stopping upon *presumptions* that laws are constitutional would soon end in the obliteration of all constitutional limitations.

Second.—The second proposition in Mr. Whitney's brief is this:

"Transporting lottery tickets and books, official prints and hit slips is commerce within the meaning of the Constitution."

He rightly apprehends the true question which arises in this case and states the proposition, and the only proposition upon which the validity of the law can be made out.

It is important to justly understand the precise extent of his proposition, that the *mere* transportation of these articles is *commerce.* It goes the following length; no matter what the *purpose* of the transportation may be, whether to facilitate some lottery transaction or not; no matter by what *way*, whether by some highway or through the fields; no matter by what *instrumentality*, whether in a railroad car or wagon, or by a person on foot—the *mere carriage*, in a single instance, of either one of the above-mentioned articles, in any case, or in any way, is made a penal offense.

This proposition seems to be, upon its face, erroneous, and at first, at least, it is difficult to see what possible means there can be of establishing it. There is nothing about the particular papers or documents referred to, or the transaction of which they are supposed to form a part, which has the remotest connection with the *interchange of commodities*. Any suggestion that the lottery business, or any part of it, or any of the steps or operations by which it is carried on, are *commerce*, in the ordinary sense attached to that word, must be at once rejected.

It is interesting to discover the process by which this proposition is sought to be maintained. To produce authority for it was out of the question. No decision of this Court could be found affording the least sanction to it. In such cases the usual resort is to *dicta*, and to the *dicta* of great men; and there is scarcely any proposition whatever which may not be thus supported if we are at liberty to separate detached passages from the context in which they are found, and take them as if they were the terms of a syllogism. The learned counsel has himself, in his brief (p. 13), interposed a caution touching this mode of reasoning, but it is really the only one upon which he relies. Seeking a definition of commerce he selects one originally given by Chief Justice MARSHAL, and many times repeated after him: "Commerce undoubtedly is traffic, but it is something more—it is intercourse." Reaching, in this manner, the definition that commerce is *intercourse*, his pathway is clear and his syllogism stands thus: "all intercourse is commerce. The transmission by one person to another of either one of these lottery documents is intercourse; therefore it is commerce; and if the transmission is across the boundary line separating States, it is interstate commerce."

The defect in this reasoning lies in the major premise. Neither Chief Justice Marshal nor anyone else has ever laid it down; least of all did the Chief Justice lay it down in the particular place in the opinion in Gibbons *vs.* Ogden, to which we are referred. If the learned counsel had taken into his mind the *whole* of the definition of the Chief Justice he might have avoided the error into which he has fallen. That definition was as follows: "Commerce, undoubtedly, is traffic, but it is something more; it is intercourse. It describes the commercial intercourse between nations and parts of nations in all its branches, and is regulated by prescribing rules for carrying on that intercourse." *Commercial* intercourse is undoubtedly commerce; or to speak more accurately, is included in the conception of commerce, and the reason is that such intercourse relates to the *interchange of commodities*. But commerce does not include any intercourse not relating to the interchange of commodities.

One may write to another, making an offer of purchase of some commodity, and such intercourse is, undoubtedly, commercial; but if he writes to a member of his family about some family matter, although there is, undoubtedly, intercourse, surely it is not *commercial* intercourse.

Commerce is a complex conception, including several things as necessary elements or incidents; but to confound a thing with its elements or incidents is to take a false step which must necessarily involve error. It may be useful to refer to some of the necessary incidents or elements of commerce and to point out the errors which would result from taking any one of these elements for the thing itself. The interchange of commodities involves *contract*, and all contracts relating to such interchange are commercial; if, however, the things interchanged are not *commodities*, the contracts are not commercial contracts. The interchange of commodities necessarily involves also *transportation*, and such transportation is commercial, but it by no means follows that *all* transportation is commercial. A man may move his habitation with his family, househould goods and chattels to another place of abode; this, undoubtedly, is transportation, but it is not commerce, because there is no interchange of anything. A commercial traveler is employed to sell goods all over the country; this is *travel*, and it is *commercial* travel, because it relates to the interchange of commodities. Another man may be employed in drumming up recruits for the army, or obtaining signatures of persons to an agreement to become members of a temperance society, or political party; but, surely, he is not engaged in commerce, nor is his travel commercial travel, or subject to any regulation by the Federal Government. A man may be employed by a museum to collect in various parts of the country different kinds of reptiles, poisonous or other, and carry them to the museum; he is engaged in transportation no doubt, but the transportation is not *commercial*, because the articles with which he is concerned are not what are called *commodities;* they are not those things which have an inherent value in themselves, and are the subjects of sale in market; he, surely, is not engaged in commerce.

The effect of the just legislation of Congress under the power to regulate commerce often is to touch and affect, to some degree, things which are not commerce and which would not, of and by themselves, be the proper subjects of congressional legislation. Congress may legislate for instance, in relation to ships, although ships may carry articles not commercial in their nature and persons in no way engaged in commerce; but this is because ships are an *instrumentality*, or a *vehicle*, of commerce, and it is therefore necessary to act upon them in exercising the power of regulating commerce. So also in regard to *highways;* Congress may legislate concerning the navigable waters of the United States, and bridges over, or ferries across them, and such legislation may affect purely local and non-commercial interests. This cannot be helped, because it is a necessary incident of the legislation, though not its motive. Congress might legislate undoubtedly concerning railroad cars used in the transportation of passengers from State to State. It might thus affect local and non-commercial interests; but this would be the incident, and not the motive to the legislation.

The same thing is true in reference to the legislation of the States under their reserved powers. States may enact laws in relation to quarantine and pilotage. The power exercised, and the motive for its exercise, are the power to preserve internal health and to increase domestic trade and the desire to benefit those interests. Such laws undoubtedly affect foreign commerce, but this result is incidental only. It would be quite erroneous to assume that, because the rightful legislation of Congress under the commercial power often incidentally affects purely local and non-commercial interests, that such interests might be affected by legislation aimed at them separately.

Mr. Whitney refers to a definition by Mr. Justice STRONG which he supposes to be equally favorable to his contention. It is the one contained in Railroad Company *vs.* Hewson (95 U. S., 465–470): "Transportation is essential to commerce, or, rather. it is commerce itself." All that Mr. Justice Strong intended here, and all that Mr. Chief Justice Marshall intended in his definition of commerce as commercial intercourse, simply was that transportation and intercourse are elements included in the complex notion of commerce.

Neither of these learned Judges really intended to *identify* commerce with intercourse, or transportation, or even with commercial intercourse or commercial transportation. That would have been to confound a thing with the incidents or elements which go to make it up. If either of them really intended what Mr. Whitney imputes to them, they could easily be convicted of palpable error, for if commerce be *intercourse*—that is to say, identical with intercourse—and commerce be also *transportation*, that is, identical with transportation, it would follow, on the familiar proposition that things which are equal to the same things are equal to each other, that intercourse was transportation, and that transportation was intercourse!

Another line of argument adopted in the learned brief of Mr. Whitney is that the papers, the carriage of which is forbidden by the statute, are *messages*, and he seems to think that it has been decided by this Court that the sending of messages from State to State is a part of interstate commerce. The Court has decided no such thing. In the cases referred to by him (*Pensacola Telegraph Co.* vs. *Western Union Telegraph Co.*, 96 U. S., 1; *Telegraph Company* vs. *Texas*, 105 U. S., 460, and others), it was indeed decided that the telegraph is an *instrumentality* of commerce, and consequently that a telegraph line from State to State could not be controlled by State legislation. These decisions, however, proceed upon the obvious ground that a telegraph wire, like a ship, or a wagon, or a railroad car, is an instrumentality of commerce, and, consequently, when extending from State to State, is an instrumentality beyond the power of the State to touch. In all this, however, no intimation even is given to the effect suggested by Mr. Whitney, that *all messages* are parts of commerce, or included in the notion of commerce, and subject to legislation as such. Does the learned counsel suppose Congress possesses power of regulation or control over a message relating to social, or family, or scientific, or political matters sent from one State to another, not by any instrumentality of commerce, but by a *private individual?*

Third.—It is necessary to keep constantly in mind in construing the extent of a congressional power, the precise subject over which, in my particular case, the Constitution confers the power. So far as we are at present concerned, the power conferred is *to regulate commerce* among the States. This may authorize legislation respecting transportation, or contracts, or railroad cars, or common carriers, or bridges, or ferries; but the power *given* is not to regulate any of these subjects, but commerce alone. The subjects named may be to a certain extent regulated, but only because it is incidentally necessary in carrying out the power actually given to regulate commerce.

The real argument of Mr. Whitney assumes that the question is to be discussed precisely as if the language of the constitution were "Congress shall have power to regulate *all transportation* among the several States;" whereas it has no express power to regulate any transportation at all. *Commercial* transportation, that is to say, transportation of commodities, from State to State, it may indeed regulate, but only because that is incidentally necessary in the execution of the power to regulate interstate commerce.

The act in question can be defined only by maintaining a proposition as broad as the following: "All transportation, of whatever form or character is *commercial*, and, as such, when carried on from State to State, within the regulating power of Congress." If this were true, it would be equally true that all *travel*, and all *intercourse*, are commercial, and there would be comparatively little of the concerns of human life, the regulation of which would not be relegated to the Federal power.

We never shall find a better definition of commerce than that which makes it consist simply in the *interchange of commodities*. This is a very broad conception, embracing many distinct elements, and throwing, consequently, many different things under the control of Congress. All commodities separated from the general mass of the property in a State and destined for transmission to places outside of it; all contracts relating to such commodities; all physical instrumentalities, like ships, wagons, railroad cars, telegraph wires, employed in relation to them; all persons, like commercial travelers, agents, &c., employed in carrying them on—these furnish ample scope for the exercise of the power bestowed upon Congress. Any attempt, under the guise and pretense of regulating commerce, to exercise the police power of the States in the reformation of morals, the prevention of evil practices and the control of individual conduct, can serve only to obscure the boundaries between State and national authority and to confound functions which should be carefully kept distinct.

JAMES C. CARTER,
Of Counsel for Plaintiffs in Error.

164-676

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JAMES H. McKENNEY,
CLERK.

164-676

In the Supreme Court of the United States.

OCTOBER TERM, 1896.

ALBERT L. FRANCE ET AL., PLAINTIFFS in error,
v.
THE UNITED STATES.
No. 495.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

BRIEF FOR DEFENDANT IN ERROR.

In the Supreme Court of the United States.

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ALBERT L. FRANCE ET AL., PLAINTIFFS in error, *v.* THE UNITED STATES.	No. 495.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

BRIEF FOR DEFENDANT IN ERROR.

Plaintiffs in error were indicted October 12, 1895, and tried before Judge Sage and a jury and convicted February 14, 1896, under § 5440 of the Revised Statutes, for conspiracy to violate the Anti-Lottery Act of March 2, 1895, ch. 191. Three other persons were joined in the indictment, but were acquitted upon the trial (p. 57).

No objections are taken to the form of the indictment, but it is claimed that the Anti-Lottery Act is unconstitutional, and that it does not apply to the carrying of "official prints" and "hit-slips" showing the result of a policy game. These are the main questions in the case.

§ 5440, so far as material, is as follows:

> If two or more persons conspire * * * to commit any offense against the United States * * * and one or more of such parties do any act to effect the object of the conspiracy, all the parties to such conspiracy shall be liable to a penalty of not less than $1,000 and not more than $10,000, and to imprisonment not more than two years.

The Anti-Lottery Act, so far as material, is as follows:

> § 1. That any person who shall cause to be * * * carried from one State to another in the United States any paper, certificate, or instrument purporting to be or represent a ticket, chance, share, or interest in or dependent upon the event of a lottery, so-called gift concert, or similar enterprise, offering prizes dependent upon lot or chance * * * shall be punishable in the first offense by imprisonment for not more than two years, or by fine of not more than $1,000, or both, and in the second and after offenses by such imprisonment only.

The indictment contains six counts, charging a conspiracy to violate the statute, accompanied with overt acts in effectuation thereof, all of date of October 4, 1895, in the County of Hamilton, State of Ohio.

STATEMENT OF FACTS.

The evidence against these defendants is circumstantial in character. The record in point of form is subject to many of the criticisms which have been so often but so ineffectually made by this court. It is padded with all kinds of useless matter, such as writs of *capias*, recognizances, marshals' returns, commitments for contempt against witnesses, etc. The proceedings on the trial are printed *verbatim*, and without the slightest attempt at condensation. They contain the examinations of many witnesses who failed to give any material testimony whatever. For the great additional labor thus imposed upon this court there seems to be no remedy under the present system of practice in criminal cases, where the Government does not prepare the bill of exceptions. With some diffidence we shall endeavor to extract from this incongruous mass a succinct statement of the relevant testimony.

Two lotteries of the variety known as "policy" have been carried on for some years past in Covington, Ky., under the direction of the defendant Albert L. France, assisted by the defendant Benjamin Hollen. One of these was known as the "Henry" [Clay], sometimes called the "Henrietta," the other as the "Kentucky." They are commonly known as the "H and K." These lotteries seem to have been regarded as legitimate under the laws of Kentucky, until the passage of what is called "Goebel's Bill" (pp. 117–18), which seems to be the Kentucky statute of March 15, 1892, ch. 7.

The game of policy is played with a glass wheel, into which the numbers from 1 to 78 are thrown, and one number is drawn out at a time until twelve have been drawn (p. 143). The players previously file their bets, each bet being a selection of three or more numbers. Three numbers are called a "gig." If the player plays only three numbers, and they all come out of the wheel, he wins $20 for a bet of ten cents. If he plays four numbers, however, he has four times as much chance of winning, since there are four gigs in four numbers. If three of his four numbers come out, therefore, he would get only $5. "Five numbers is ten gigs; they jump up pretty lively after that" (p. 114). The record contains some interesting information as to this game. For instance, an expert, whose ordinary business was cleaning up the rooms for one of the managers, was proved to have kept a roll showing which of the numbers had come out on each drawing during the summer and fall of 1895. The trial judge instituted an investigation into the value of such a roll, and elicited the following information (p. 226):

> You see, Judge, I could look over this roll and see when a certain number was out before. That was my motive. A great many people have come to me—have come into my room to get me to tell them when a certain gig was out last, and by looking at this roll I could tell them to the very day.
>
> Q. You could tell when 4, 11, 44 came out last, could you?
>
> A. Well, I don't fool with that, Judge; that is a very bad gig to fool with.

The roll kept by this witness showed that the game had been played regularly twice a day for some months up to October 4, 1895 (pp. 226–7). The betting was done, usually at least, not at the head office, but at various agencies scattered about. There was such an agency in nearly every street in Cincinnati (p. 107). These were all under the direction of defendant Morris J. Richmond (misnamed Maurice Richmond in the writ of error). The persons who took the bets at these agencies were called "writers." A writer's commission in Cincinnati is 20% of the amount of the bet (p. 112). These offices are little rooms in the back of buildings or in basements (p. 105).

The bet is put down on a piece of paper, taking a carbon copy. One is kept by the writer and the other given to the player (p. 105). In order to make his testimony clear, one of the witnesses made out a sample bet, or, as it is called by the policy writers in Cincinnati, a "ticket" (pp. 111, 112, 121, 220, 221). A *facsimile* of this sample ticket is found in the record as Exhibit A, immediately after p. 312. It contains simply the letter H (showing that the bet is made for the Henry lottery); the numbers 18, 44, and 61 (being the gig selected by the player), and the number 10 in a circle (meaning that the player bets ten cents).

Before the carrier calls on his way to Covington, the policy writer makes out a "book." This is simply a schedule of the bets made at his agency (pp. 112, 122, 125). A sample is contained in the record as Exhibit B. Another sample "book" made out by the same witness (p. 128) is contained in the record as Exhibit E.

These books are collected by the carriers and taken across the bridge to the headquarters at Covington. They go afoot. The routes of these carriers are described at pp. 196–7, 235–8, 252–3.

After the drawing from the wheel is completed, an "official print" is made. This is a printed sheet, showing the numbers drawn in each of the lotteries on the day for which it is issued. The first line contains the twelve numbers in their consecutive order, as they came out of the wheel. The second line contains the same numbers arranged in their natural order. Exhibits G, H, and I, at pp. 313 and 314, are copies of the official print actually issued October 4, 1895. These official prints are brought back by the carriers at the end of the day.

Besides the official prints the carriers bring back what are known as "hit-slips." These are slips of paper showing the winning bets, and are accompanied by the money (pp. 105, 112, 113, 125, 147–8). A sample "hit-slip" is inserted in the record as Exhibit C. One actually used October 4, 1895, in somewhat different form is inserted as Exhibit D (pp. 113–4, 147–9, 268).

The defendant France, as already stated, was the main manager. Hollen was his assistant. Richmond was the manager of the Cincinnati agencies. The other plaintiffs in error were policy writers in Cincinnati. The carriers were not indicted. They were seized and brought before the Grand Jury October 4, 1895, and the papers mentioned in the indictment, and afterwards put in evidence as Exhibits D, G, H, and I, were then taken from them.

The evidence as to each plaintiff in error, showing his connection with the lottery conspiracy, is in brief as follows:

Albert L. France and Benjamin Hollen.—These men were connected with the "H and K" lotteries, the former as manager, and the latter in a clerical position, handling the money (pp. 104–8, 134–8, 150). Their office, until June 1, 1895, was at the corner of Fifth and Madison Streets, in Covington. It was then moved to the corner of Second and Court Streets, over Payne's pool room (pp. 108, 134–8, 145, 211; see pp. 1151–6). Official prints were seen in their possession (pp. 140–11). The three carriers, Irvine, Wagner, and Edgar, were traced to their offices (pp. 138, 146, 197, 237, 239, 243–4). The admissions as to their business, which were drawn with difficulty from John Bickle, brother of the defendant George Bickle, are interesting (pp. 132, 134–9).

George Williams.—In October, 1895, and for two years theretofore, Williams had been a policy writer for "H and K" at the corner of Third and John Streets, in Cincinnati (pp. 107, 173–5, 190, 216–21, 225, 230–1). There was an eyewitness to his meetings with the carriers (pp. 240–1; see also pp. 236, 238).

James Sanderline.—The carrier was seen to call at his place in Cincinnati, on Plum Street, near Walnut (p. 236; see p. 219).

Nat Hyams.—The carrier was traced to his place (pp. 236, 238).

John Rothenstein.—One of the witnesses had played policy at his place in Cincinnati, on Central Avenue, near Ninth (pp. 232–3); had seen him there (p. 234). The carrier was seen to call there (p. 236).

George Bickle (misnamed in the writ of error George Bickles) had an office on Central Avenue, in Cincinnati, as a policy writer (pp. 107, 141). He had also been a carrier (pp. 109, 115). The carrier was traced to his place (p. 236).

Morris J. Richmond (misnamed in the writ of error Maurice Richmond) was the manager of the "H and K" on the Ohio side (pp. 106, 129, 150–1, 199–200).

Charles W. Reilly was a policy writer (pp. 190, 192, 193, 243). The carriers went to his place (pp. 193–5, 236, 238). He was shown to have met them personally (p. 241). Official prints were found in his possession p. 243).

CONSTITUTIONALITY OF THE ANTI-LOTTERY LAW.

The former Anti-Lottery Law was based on the power to establish post-offices and post roads. This court held that Congress could exclude lottery matter from the mails, although it had no power to exclude such matter from transmission in other ways. (*Ex parte Jackson*, 96 U. S., 727; *In re Rapier*, 143 U. S., 110; *Horner* v. *United States*, 143 U. S., 207, 213). The commerce clause was not relevant to the former law, and was not considered by the court in these cases, and they are therefore not in point here as authorities.

It is respectfully submitted, however, that the present statute is likewise constitutional, for the following reasons:

I.

Presumptively the law is constitutional.

"In examining an act of Congress it has been frequently said that every intendment is in favor of its constitutionality. Such act is presumed to be valid unless its invalidity is plain and apparent; no presumption of invalidity can be indulged in; it must be shown clearly and unmistakably. This rule has been stated and followed by this court from the foundation of the government." (*United States* v. *Gettysburg Electric Ry.*, 160 U. S., 668, 680, per Mr. Justice Peckham.)

II.

Transporting lottery tickets and books, official prints, and hit-slips, is commerce within the meaning of the Constitution.

In the leading case of *Gibbons* v. *Ogden*, 9 Wheat., 1, Mr. Oakley, for defendant in error, argued that commerce is only "transportation and sale of commodities" (p. 76). Mr. Emmet gave a definition as "the exchange of one thing for another; the interchange of commodities; trade or traffic" (p. 89). Mr. Wirt, in reply, claimed that it "always implies intercommunication and intercourse" (pp. 182–3). This last definition was adopted by the court in the words of Chief Justice Marshall, so often quoted (p. 189):

> The subject to be regulated is commerce; and * * * it becomes necessary to settle the meaning of the word. The counsel for the appellee would limit it to traffic, to buying and selling, or the interchange of commodities. * * * Commerce undoubtedly is traffic, but it is something more—it is intercourse.

In that case it was held that the transportation of passengers by sea is commerce. This ruling has frequently since been followed, and has been extended to the transportation of passengers by land.

In *Railroad Company* v. *Husen*, 95 U. S., 465, 470, Mr. Justice Strong said:

> Transportation is essential to commerce; or rather, it is commerce itself.

In *Pickard* v. *Pullman Co.*, 117 U. S., 34, 48, Mr. Justice Blatchford says that the cases collated in *Head Money Cases*, 112 U. S., 580, "show it to be a settled matter that to tax the transit of passengers from foreign countries or between the States is to regulate commerce."

In *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S., 196, 203, Mr. Justice Field, holding that a tax on the business of ferrying passengers from New Jersey to Pennsylvania to be a regulation of commerce, said:

> Commerce among the States consists of intercourse and traffic between their citizens.

It is not alone the carriage of passengers in a boat, a railroad car, or a wagon that is commerce. It has recently been held by this court that the mere passage of foot passengers from one side to the other of the Ohio river is commerce. (*Covington Bridge Co.* v. *Kentucky*, 154 U. S., 204, 218.) Mr. Justice Brown, in delivering the opinion of the majority of the court, said:

> Commerce was defined in *Gibbons* v. *Ogden*, 9 Wheat., 1, 189, to be "intercourse," and the thousands of people who daily pass and repass over this bridge may be as truly said to be engaged in commerce as if they were shipping cargoes of merchandise from New York to Liverpool. While the bridge company is not itself a common carrier, it affords a highway for such carriage, and a toll upon such bridge is as much a tax upon commerce as a toll upon a turnpike is a tax upon the traffic of such turnpike, or the charges upon a ferry a tax upon the commerce across a river.

But assume that the mere passage of these pedestrians across the Covington Bridge did not constitute intercourse between the States of Ohio and Kentucky within the meaning of the opinions above quoted. What were they carrying?

In the first place, they were in charge of messages relating to business transactions. They were thus, in a slower way, doing precisely the same business as a telegraph company, and their case comes within the decision of this court in *Pensacola Telegraph Co.* v. *Western Union Telegraph Co.*, 96 U. S., 1, and the cases which have followed it.

In *Telegraph Co.* v. *Texas*, 105 U. S., 460, 464, and *Western Union Telegraph Co.* v. *Pendleton*, 122 U. S., 347, 356, this court has stated that the telegraph business "is commerce itself," although, as stated in the latter case, "the telegraph transports nothing visible and tangible; it carries only ideas, wishes, orders, and intelligence." These pedestrians carried visible substances, one of which was an evidence of title to money.

Because carrying telegraphic messages is "commerce itself," it is well settled that no tax can be laid upon interstate telegraphic messages, although a State may tax messages between points within its own borders. (*Ratterman* v. *Western Union Telegraph Co.*, 127 U. S., 411; *Leloup* v. *Port of Mobile*, 127 U. S., 640.)

It is not merely messages in regard to business transactions that can not be taxed by the State. No interstate messages can be taxed, whatever may be their purport. Among interstate telegrams there is no distinction made between commercial and noncommercial. Thus in the Texas case above cited the court say of a tax regulated by the number of messages sent (p. 466):

> Clearly * * * this must be a tax on the messages. As such, so far as it operates on private messages sent out of the State, it is a regulation of

> foreign and interstate commerce and beyond the power of the State. * * * It follows that the judgment, so far as it includes the tax on messages sent out of the State, or for the Government on public business, is erroneous.

Moreover, such a business involves the transportation of money from State to State; and transportation of property is commerce. (*Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S., 196, 203.) The lottery business may be unlawful, but it is commercial in character. In former days it was regarded as neither unlawful nor immoral. Governments everywhere raised moneys in this manner, as Austria still does (*Horner* v. *United States*, 147 U. S., 449); and so also did educational, charitable, and religious institutions. In some States public opinion has turned against lotteries within but very few years past—Kentucky, for instance, only in 1892. The fact that during the period from 1788 to 1896 they have become almost universally regarded as immoral and illegal can not change the meaning or application of the Constitution of the United States; and whether or not lottery tickets shall be the lawful subject of interstate commerce is for Congress to decide. (*In re Rahrer*, 140 U. S., 545, 558.)

Some reliance is placed upon cases in this court laying down the proposition that insurance (which also involves the transmission of messages and money) is not commerce. (*Paul* v. *Virginia*, 8 Wall., 168, 183; *Ducat* v. *Chicago*, 10 Wall., 410; *Liverpool Ins. Co.* v. *Massachusetts*, 10 Wall., 566, 573; *Trade-Mark Cases*, 100 U. S., 82, 95; *Philadelphia Fire Association* v. *New York*, 119 U. S., 110, 118; *Crutcher* v. *Kentucky*, 141 U. S., 47, 59; *Hooper* v. *California*, 155 U. S., 648.) This is the only line of authorities of which we are aware wherein intercourse between persons in different States, carried on for the purpose of profit, has been held not to be commercial. It will be noticed that this court has never had the question squarely presented whether Congress may enact legislation regulating the insurance business. In reading the courts' opinions upon these insurance cases, the question actually presented to the court must be kept in mind. (*License Cases*, 5 How., 504, 573, *per* Mr. Chief Justice Taney; *Woodruff* v. *Parham*, 8 Wall., 123, 138; *Doyle* v. *Continental Ins. Co.*, 94 U. S., 535, 538; *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U. S. 429, 574–5, and cas. cit.)

The precise point decided in these insurance cases is that the insurance business is not so commercial in character that a State is obliged to admit to participation in it the insurance corporations in other States; although there are commercial corporations, such as express companies, which it is obliged to admit. (*Crutcher* v. *Kentucky*, 141 U. S., 47, 59.)

The principle upon which these cases are decided is stated to be that insurance is not commerce. It has, however, very often been announced by this court that diseased persons and goods, paupers, felons, putrescent and pernicious articles in general are not subjects of commerce. (*License Cases*, 5 How., 504, 594, 600, 629, 631–2; *Passenger Cases*, 7 How., 283, 400, 425–6, 463, 467, 484, 490; *Moore* v. *Illinois*, 14 How., 13; *Railroad Co.* v. *Husen*, 95 U. S., 465, 471–3; *Bowman* v. *Chicago, &c.*,

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Ry. Co., 125 U. S., 465, 490–2, 504; *Kimmish* v. *Ball*, 129 U. S., 217, 221; *Leisy* v. *Hardin*, 135 U. S., 100, 113; *In re Rahrer*, 140 U. S., 545, 557; *Crutcher* v. *Kentucky*, 141 U. S., 47, 60, 61.) The language in many of these citations, if literally construed, would imply that Congress had no regulating power in the premises. Nevertheless, it has been clearly recognized by this court, and is undoubtedly true, that Congress may interpose and make a controlling decision as to what articles are and what are not fit subjects of foreign or interstate commerce. (*Morgan* v. *Louisiana*, 118 U. S., 455, 464; *In re Rahrer*, 140 U. S., 545, 558.) Congress in recent years has frequently exercised this power. We may refer to the Quarantine Acts of April 29, 1878, ch. 66, and February 15, 1893, ch. 114, § 3; the Interstate Quarantine Act of March 27, 1890, ch. 51; the pleuro-pneumonia legislation of May 29, 1884, ch. 60, §§ 4–6; and the legislation concerning commerce in adulterated food and diseased animals (Acts of August 30, 1890, ch. 839, and June 6, 1896, ch. 337).

It is respectfully submitted that, notwithstanding the language used in various opinions with relation to insurance corporations, Congress may, if necessary, regulate insurance business in its relations to interstate and foreign intercourse. The peculiar commercial warfare which has been for some time carried on between the States through retaliatory insurance legislation (6 Am. Law Review, N. S., 62–72) has recently been extended by one State so as to raise an international question. Certain large metropolitan life insurance companies having been forbidden to transact business in the Kingdom of Prussia, the State of New York, by its act of February 17, 1896, ch. 23, provided that when New York insurance companies, whose solvency and good management have been certified to by the State Superintendent of Insurance, should be refused permission to transact business with any foreign country, "after such company has complied with any *reasonable* laws of such foreign country, requiring deposits of money or securities with the government of such country, then and in such case the superintendent shall forthwith cancel the authority of every company organized under the laws of such foreign government and licensed to do business in this State, and shall refuse a certificate of authority to every such company thereafter applying to him for authority to do business in this State, until his certificate shall have been duly recognized by the government of such country." Suppose that a State should go further and enact that no insurance transactions, marine, life, fire, accident, or fidelity, should be carried on between New Yorkers and the inhabitants of any foreign country, or of some specified foreign country. Is the insurance business so noncommercial in character that Congress could not intervene?

However this may be, the lottery traffic is not analogous to insurance, but in the development now under consideration is very closely analogous to the business of telegraphy and expressage; and therefore, while in the absence of Congressional legislation the State can doubtless admit or exclude at its option lottery tickets and moneys (*License Cases*, 5 How., 504, 628; *Crutcher* v. *Kentucky*, 141 U. S., 47, 61), nevertheless Congress has a power of regulation which when exercised is supreme.

III.

The power to regulate interstate or foreign commerce implies a power to prohibit such commerce in any given article.

In *Gibbons* v. *Ogden*, 9 Wheat., 1, 196, Chief Justice Marshall said:

> We are now arrived at the inquiry—what is this power? It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution.

The power over interstate commerce is the same as that over foreign commerce. Both are granted in the same clause of the Constitution and in the same language. (*Gibbons* v. *Ogden*, 9 Wheat., 1, 228; *License Cases*, 5 How., 504, 578; *Brown* v. *Houston*, 114 U. S., 622, 630; *Bowman* v. *Chicago, &c., RR. Co.*, 125 U. S., 465, 482; *Crutcher* v. *Kentucky* 141 U. S., 47, 58; *Pittsburg Co.* v. *Bates*, 156 U. S., 577, 587; 2 Story on the Constitution, § 1065.) In *Leisy* v. *Hardin*, 135 U. S., 100, 108, Chief Justice Fuller said:

> The power vested in Congress "to regulate commerce with foreign nations, and among the several States, and with the Indian tribes," is the power to prescribe the rule by which that commerce is to be governed, and is a power complete in itself, acknowledging no limitations other than those prescribed in the Constitution.

In the exercise of its power to regulate foreign commerce, Congress has never hesitated to prohibit commerce in any particular article, or even to stop foreign commerce altogether, either for a fixed period of time or indefinitely. A well-known instance of partial prohibition is that of obscene literature, which has been part of our laws ever since the tariff act of August 30, 1842, ch. 270, § 28. To the latter class belong the well-known nonimportation and embargo laws of the period prior to the war of 1812. (See *Gibbons* v. *Ogden*, 9 Wheat., 1, 192–3; 2 Story on the Constitution, §§ 1264, 1289, 1290.)

Congress has the same power over interstate commerce as over commerce with the Indian tribes. The question whether, under its power to regulate commerce with the Indian tribes, it could exclude any selected article from such commerce as deleterious, came up for decision in *United States* v. *Holliday*, 3 Wall., 407, 416–18, and was decided in the affirmative in an opinion by Mr. Justice Miller. This ruling was reaffirmed in *United States* v. *43 Gallons of Whiskey*, 108 U. S., 491, in an opinion by Mr. Justice Davis. Both of these cases related to the statute prohibiting the sale of spirituous liquors, whose constitutionality has since then been assumed without question. (*United States* v. *Le Bris*, 121 U. S., 278; *Sarlls* v. *United States*, 152 U. S., 570; *United States* v. *Mayrand*, 154 U. S., 552.)

If Congress can exclude obscene literature from foreign commerce, why not from interstate commerce also; and if it can exclude obscene literature, why can it not exclude lottery tickets? If it can exclude spirituous liquors from commerce with the Indian tribes, why not from interstate commerce also; and if it can exclude spirituous liquors, why can it not exclude lottery tickets?

The principle has in effect already been decided by this court. States have undertaken in the interests of the public health to exclude importations of a certain kind from other States; and their legislation has been held by this court to be unconstitutional. (*Railroad Co.* v. *Husen*, 95 U. S., 465; *Minnesota* v. *Barber*, 136 U. S., 313; *Brimmer* v. *Rebman*, 138 U. S., 78; *Voight* v. *Wright*, 141 U. S., 62.) These laws were not held to be void, because they in effect levied taxes upon imports; for it is well settled that the word "imports" in the Constitution refers only to articles brought in from foreign countries. (*License Cases*, 5 How., 504, 623; *Woodruff* v. *Parham*, 8 Wall., 123; *Brown* v. *Houston*, 114 U. S., 622, 628; *Coe* v. *Errol*, 116 U. S., 517, 526; *Pittsburgh Co.* v. *Louisiana*, 156 U. S., 590, 600.) The laws were held void because they were regulations of commerce. But the Constitution does not expressly prohibit States from regulating commerce. It merely gives the power of regulation to Congress. Whenever, therefore, this court has held a State law void as being a regulation of commerce, it has impliedly held that a law to the same effect could constitutionally be passed by Congress; that is, so far as Congress is not restrained by some express prohibition.

Indeed, the most familiar exercise of the power to regulate commerce in the minds of the men who framed the Federal Constitution was doubtless the total or partial prohibition of traffic in particular articles. This was often accomplished by duties; and those duties, so far as they were laid for prohibition, total or partial, and not for revenue, were regarded as regulations of commerce. Thus Chief Justice Marshall, in his Life of Washington, uses the following language in speaking of the American colonies before the Stamp Act of 1765 (Vol. II, pp. 76–7, 1st ed.):

> In the middle and southern provinces the authority of such of the acts of Parliament of internal revenue as were made for America, as well as those for the regulation of commerce, even by the imposition of duties, provided those duties were imposed for the purpose of regulation, had been at all times admitted.

And again the Chief Justice says (Vol. II, p. 81, 1st ed.), speaking of the Stamp Act:

> The colonies had long been in the habit of submitting to duties laid on their trade, and had not generally distinguished between those which were imposed for the mere purpose of regulating commerce and this, which, being also designed to raise a revenue, was in truth to every purpose a real tax.

In *Gibbons* v. *Ogden*, 9 Wheat., 1, 202, speaking of the constitutional restriction upon the powers of the States in the matter of duties on tonnage, the Chief Justice says:

> It is true that duties may often be, and in fact often are, imposed on tonnage with a view to the regulation of commerce; but they may be also imposed with a view to revenue; and it was therefore a prudent precaution to prohibit the States from exercising this power. The idea that the same measure might, according to circumstances, be

> arranged with different classes of power was no novelty to the framers of our Constitution. Those illustrious statesmen and patriots had been, many of them, deeply engaged in the discussions which preceded the war of our Revolution, and all of them were well read in those discussions. The right to regulate commerce, even by the imposition of duties, was not controverted; but the right to impose a duty for the purpose of revenue produced a war as important, perhaps, in its consequences to the human race as any the world has ever witnessed.

The remarks of the Chief Justice are fully borne out by history; and the classification of import duties into revenue duties and regulations of commerce lay at the basis of the American doctrine which led to the Revolutionary war. We may refer to the Journals of the Continental Congress, Vol. 1, pp. 28, 175, 176; Vol. 2, p. 189; the examination of Dr. Benjamin Franklin at the bar of the House of Commons on February 7, 1766 (1 Bigelow's Life of Franklin, pp. 478–9); John Dickinson's "Letters from a Farmer," published in 1768, pp. 15, 18–19, 37–42, 43 (note), 60, 61, 66; Dr. Franklin's letter to Joseph Galloway of February 25, 1775 (8 Sparks' Franklin's Works, p. 146); and John Adams' letter to Jay of July 19, 1785 (Works of John Adams, Vol. 8, pp. 282, 283). The same view was maintained by the leading jurists and statesmen of the first two generations after the adoption of the Constitution; and with practical unanimity they based the protective tariff duties on the commerce clause of the Constitution. (1 Story on the Constitution, § 963; 2 id., §§ 1080 et seq; James Madison's letter to Joseph C. Cabell of March

22, 1827 (Writings of James Madison, vol. 3, p. 571); his letter to Cabell of September 18, 1828 (id., p. 636); Henry Clay's reply to Barbour, March 31, 1824 (Annals of Congress, p. 1994); Gulian C. Verplanck's Letter to Drayton, New York, 1831, pp. 21–3; Speech of Thomas Smith Grimké, etc., Charleston, 1829, p. 51.) Mr. Grimké states that (p. 62)—

> In 1790 Edmund Randolph, in his opinion to the President, states among the heads of the power to regulate commerce with foreign nations the power to prohibit their commodities to impose or increase the duties on them.

All of the passages here referred to were set forth in full in the brief filed on behalf of the plaintiff in error in the cases of *United States* v. *Gay* and *United States* v. *Realty Company*, argued and decided at the last term of this court.

A recent instance of the imposition of duties under the power to regulate commerce is to be found in the act of August 3, 1882, ch. 376, § 1, which provides "that there shall be levied, collected, and paid a duty of fifty cents for each and every passenger not a citizen of the United States who shall come by steam or sail vessel from a foreign port to any port within the United States." In *Head Money Cases*, 112 U. S., 580, 595, Mr. Justice Miller, in delivering the opinion of the court, says that "the power exercised in this instance is not the taxing power. The burden imposed on the ship owner by this statute is the mere incident of the regulation of commerce." (See also Mr. Justice Blatchford's opinion in this case at 18 Fed. Rep., 135, 139, quoted by

Mr. Justice Field in *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U. S., 429, 594.)

In its application to imports, the power to impose such exactions or duties is a power to exclude. (*Passenger Cases*, 7 How., 283, 461, 463; see *McCulloch* v. *Maryland*, 4 Wheat., 316, 431.) There can be no doubt that Congress, under its power to regulate commerce, in so far as not prohibited by the Constitution, may do either. It can not, indeed, levy pecuniary exactions upon interstate commerce for revenue purposes. It can, however, so long as it does not discriminate against the ports of any of the States, restrict commerce in any article by means of such charges; or it can, as in this instance, prohibit it altogether.

IV.

The power to regulate interstate commerce being an express power, with no express restrictions on the prohibition of interstate traffic in a given article, the purposes for which Congress may prohibit are not reviewable by the courts.

An implied power can be exercised only for the purposes for which it is required; but an express power is unlimited, and may be exercised whenever Congress in its discretion shall see fit. Thus in *McCulloch* v. *Maryland*, 4 Wheat., 316, 421, Chief Justice Marshall said of the power to incorporate:

> Had it been intended to grant this power as one which should be distinct and independent, to be exercised in any case whatever, it would have found a place among the enumerated powers of the Government.

It may be argued that this prohibition of lottery traffic is in aid of the police power of the States, or even an attempt by Congress to supply deficiencies in the exercise of police power by certain States; and that Congress is not vested with such police power. Were this so, nevertheless Congress, having an express and unlimited power to regulate interstate commerce, may do so without having its reasons questioned. (See *Doyle* v. *Continental Ins. Co.*, 94 U. S., 535, 541.) It is well settled that Congress has no power to regulate an agricultural or manufacturing industry (*United States* v. *E. C. Knight Co.*, 156 U. S., 1, and cas. cit.); yet, as above shown, it has always claimed and exercised a right to use its commercial power for the purpose of directing the course of development of these industries. Congress has no power to regulate the descent of real property in the various States; yet it has always had, and frequently exercised, the power to make treaties for the purpose of altering these laws of descent, on behalf of the subjects of favored European nations. (*Hauenstein* v. *Lynham*, 100 U. S., 483, and cases cited; *Geofroy* v. *Riggs*, 133 U. S., 258, 266–7.) The exclusion of obscene articles from foreign commerce and of spirituous liquors from commerce with the Indian tribes is for purposes precisely similar to those which inspire our antilottery legislation.

APPLICABILITY OF THE ACT.

Defendants seem to place main reliance upon their argument that the statute can not apply to these "official prints" and "hit-slips," because they are mere matters of information, transmitted across the river after the drawing has taken place.

The first count of the indictment charges that the conspiracy is "to cause to be carried from one State to another in the United States, to wit, from Covington, in the State of Kentucky, to Cincinnati, in the State of Ohio, *papers, certificates, and instruments* purporting to be and to represent, as they then and there well knew, *chances, shares, and interests* in and dependent upon the event of a lottery or similar enterprise offering prizes dependent upon lot and chance; * * * chances, shares, and interests in the prizes which by lot and chance might be awarded to persons (to these grand jurors unknown) who might select the numbers which by lot and chance should be included in the twelve numbers drawn and selected as hereinafter stated at the drawings of the so-called Kentucky lottery and the so-called Henry lottery." The overt act charged is the carrying of one of the official prints hereinbefore described. The next four counts are similar. The last count differs in that the overt act charged is the carriage of a "hit-slip."

About the "hit-slip" there can be no doubt. The slip was evidence of title to $5 won in the lottery, and it was accompanied by the money. In other words, it was a certificate representing the interest of the person referred to therein. As the jury has convicted the defendants upon this as well as upon the first five counts, the conviction is, in part at least, to be sustained. (*Ballew* v. *United States,* 160 U. S., 187; *Putnam* v. *United States,* 162 U. S., 687.)

The official print, however, is equally within the statute. It is not a mere dissemination of news, as a newspaper item or a telephone message would be. It is, as its name implies, "official." It is evidence, for the benefit of whom it may concern, that the numbers stated thereon were drawn out of the wheel. If the "hit-slip" should be lost or destroyed, the official print would be sufficient evidence upon which the fortunate gambler, through his policy writer, could demand his money.

JURISDICTION OF THE OHIO COURT.

The motions in arrest of judgment question the jurisdiction of the court. This is not discussed in the brief, and appears to be incontestable.

The Constitution provides that criminal trials "shall be held in the State where the said crimes shall have been committed" (Art. III, § 2); and shall be "by an impartial jury of the State and District wherein the crime shall have been committed, which district shall have been previously ascertained by law" (Sixth Amendment).

It will be noticed that the trial is to be in the State and District where the crime is committed; not in the State and District where defendant was personally present at the time of the commission of the crime. This is an important distinction; and the fact that defendants France and Hollen are not proved to have been personally present in the State of Ohio is therefore immaterial.

Was this crime committed in Ohio or Kentucky? Or was it commenced in one State and finished in the other? It is clear that the Constitution was not intended to exempt criminals from prosecution if they should succeed in crossing the State line before completing the criminal act. § 5440 of the Revised Statutes, upon which this prosecution is founded, was originally a part of the Internal Revenue Act of March 2, 1867, ch. 169, § 30. Conspiracy is a crime particularly liable to have an interstate character; and consequently the same section contained a further provision, which is now incorporated in the Revised Statutes as § 731, and is as follows:

> When any offense against the United States is begun in one judicial district and completed in another, it shall be deemed to have been committed in either, and may be dealt with, inquired of, tried, determined and punished in either district in the same manner as if it had been actually and wholly committed therein.

The gist of this prosecution is not the overt act, but the conspiracy. (*United States* v. *Britton*, 108 U. S., 199, 204.) If we assume that none of the Kentucky defendants were ever in Ohio, and that none of the Ohio defendants were ever in Kentucky, then the conspiracy must have been effectuated by correspondence, and § 731 would apply. (*In re Palliser*, 136 U. S., 257; *Horner* v. *United States*, 143 U. S., 207, 214.) The latter of these two cases was a prosecution for sending lottery prize lists through the mail, and it was held proper to send the offender to Illinois for trial, since he caused the prize lists to be delivered there through the post-office, although he was personally in the State of New York when the lists were mailed and received. *In re Palliser* was also a prosecution for sending improper matter through the mail. The offender was personally in the State of New York, but he addressed his letter to the State of Connecticut, and this court held that he was properly tried in the latter State, Mr. Justice Gray quoting constitutional provisions, and saying (pp. 265–6):

> But the right thereby secured is not a right to be tried in the district where the accused resides, or even in the district in which he is personally at the time of committing the crime, but in the district "wherein the crime shall have been committed." * * * When a crime is committed partly in one district and partly in another, it must, in order to prevent an absolute failure of justice, be tried in either district, or in that one which the legislature may designate.

A conspiracy, however, is in the nature of a contract. Its *locus* must be where the minds of the parties met. The connecting link between the managers and the policy writers in the present case was Morris J. Richmond, who, on behalf of the former, deputed and located the latter in their various agencies. In him the conspiracy centered, and he was in the Southern District of Ohio. Moreover, the conspiracy consisted in the establishment of various agencies for the purpose of extending the field of the Kentucky lottery into Ohio. But a contract of agency is regarded presumptively as "made in the place where the agent resides." (Story Conflict of Laws, § 285.)

Dealy v. *United States*, 152 U. S., 539, was a prosecution under the same statutory provision. The indictment alleged that the conspiracy was made in the State of

North Dakota. It did not allege in what State or district the overt acts were committed; nor did it even appear that they were committed within the jurisdiction of the United States. This omission was relied upon by plaintiff in error. The overt act alleged consisted in certain inducements and persuasions. Mr. Justice Brewer said (pp. 546–7):

> While it is true there is no specific allegation that the act of inducing and persuading was done within the jurisdiction of the court, and while it may be possible, as counsel suggest, that, so far as this record discloses, all the solicitation and persuasion exercised by the defendant was done within the limits of Canada, and outside the jurisdiction of the trial court, yet the solicitation was to do a wrongful act within the State of North Dakota, *In re Palliser*, 136 U. S., 257, 265, and that solicitation was not a part of the conspiracy, but subsequent to and in furtherance of it. The gist of the offence is the conspiracy. As said by Mr. Justice Woods, speaking for this court, in *United States* v. *Britton*, 108 U. S., 199, 204: "This offence does not consist of both the conspiracy and the acts done to effect the object of the conspiracy, but of the conspiracy alone. The provision of the statute, that there must be an act done to effect the object of the conspiracy, merely affords a *locus penitentiæ*, so that before the act done either one or all of the parties may abandon their design, and thus avoid the penalty prescribed by the statute." Hence, if the conspiracy was entered into within the limits of the United States and the jurisdiction of the court, the crime was then complete, and the subsequent overt act in pursuance thereof may have been done anywhere.

It is thus clear that the *locus* of the original conspiracy was in the Southern District of Ohio. A conspiracy continues, however, except as to such persons who may have broken their connection with it, as long as any overt acts are being performed in pursuance of the original agreement, and the conspirators may therefore be prosecuted in any district where an overt act can be proved. (1 Bishop's New Criminal Procedure, § 61, and cas. cit.) On this principle also the conspirators, under § 731 of the Revised Statutes, may be prosecuted in the Southern District of Ohio. Hence persons abetting the commission of crimes are indictable where the crimes are committed. (Id., §§ 57, 58, and cas. cit.) A leading case is that of *The King* v. *Bowes*, tried on the King's Bench in 1787, and described by Grose, J., in *The King* v. *Brisac*, 4 East, 164, 171. In the latter case the learned judge said:

> If it were necessary on this occasion to consider how far every count in this information has been established by the evidence adduced, so as to bring every one of them within the jurisdiction of this court, it would be to be recollected that conspiracy is a matter of inference, deduced from certain criminal acts of the parties accused, done in pursuance of an apparent criminal purpose in common between them, and which hardly ever are confined to one place; and that, from analogy, there seems no reason why the crime of conspiracy, amounting only to a misdemeanor, may not be tried wherever one distinct overt act of conspiracy is in fact committed, as well as the crime of high treason in compassing and imagining the king's death, or in conspiracy to levy war. In the *King* v. *Bowes and others* the trial

> proceeded upon this principle; where no proof of actual conspiracy embracing all the several conspirators was attempted to be given in Middlesex, where the trial took place, and where the individual actings of some of the conspirators were wholly confined to other counties than Middlesex; but still the conspiracy as against all having been proved from the community of criminal purpose, and by their joint co-operation in forwarding the objects of it, in different places and counties, the locality required for the purpose of trial was holden to be satisfied by overt acts done by some of them in prosecution of the conspiracy in the county where the trial was had.

Another interesting case is that of *People* v. *Mather*, 4 Wend., 229, 259, where defendant was indicted for participation in the conspiracy to abduct the famous William Morgan. Defendant was tried in Orleans County, New York, where he resided and where he entered the conspiracy. The overt act was committed in Ontario County. Marcy, J., after showing that the trial in Orleans County was proper, proceeded to show that it would have been equally proper in the county where the overt act was done:

> If conspirators enter into the illegal agreement in one county, the crime is perpetrated there, and they may be immediately prosecuted; but the proceedings against them must be in that county. If they go into another county to execute their plans of mischief, and there commit an overt act, they may be punished in the latter county without any evidence of an express renewal of their agreement. The law considers that wherever they act, there they renew, or perhaps, to speak more properly, they continue their agreement, and this agreement is

> renewed or continued as to all whenever any one of them does an act in furtherance of their common design. In this respect conspiracy resembles treason in England when directed against the life of the king. The crime consists in imagining the death of the king. In contemplation of law the crime is committed wherever the traitor is and furnishes proof of his wicked intention by the exhibition of any overt act.

That a criminal may be tried in a State wherein he never before had been personally present is exemplified by various well-known decisions, among which we may cite *Commonwealth* v. *Gillespie*, 7 S. & R., 469, 478; *Commonwealth* v. *Smith*, 11 Allen, 247, 259; *Lindsey* v. *State*, 38 Oh. St., 507; see also *United States* v. *Rindskopf*, 6 Biss., 259, 268.

ASSIGNMENTS OF ERROR.

We now take up the assignments of error *seriatim*.

I. Twelve jurors having been seated in the box, but not yet sworn, the bill of exceptions states that "counsel for the Government announced his satisfaction with the jury." Thereafter counsel for one of the defendants "excused" a juror, and another was called to take his place. "After consultation," the District Attorney then "excused" a juror, "to which counsel for defendants objected, on the ground that counsel for plaintiff, having announced their satisfaction with the jury, thereby waived their right to challenge." The objection was overruled "for the reason that the course taken was according to the settled practice of this court;" and defendant's counsel excepted (p. 103). It does not appear in what manner the District Attorney announced his satisfaction. The burden is upon the defendants to show error; and it is therefore presumable that the District Attorney merely expressed an opinion on his right to challenge. It does not appear that defendants were in any way prejudiced. They had no right to require the Government challenges to be exhausted first. The order in which challenges shall be made is regulated by the practice of the trial courts, and varies in the different districts; nor is it affected by any regulations of the State courts. (*Pointer* v. *United States*, 151 U. S., 396, 407, 409, 411; 1 Thompson on Trials, §§ 88, 93.) Indeed, at common law the prisoner was required to exhaust his peremptory challenges before the Government began challenging. (1 Bish. New Crim. Pro., §§ 938, 939, and cas. cit.; *Turpin* v. *State*, 55 Md., 462, 465.)

Moreover, the improper *exclusion* of a juror is not, by the weight of authority, a ground of exception. (1 Thompson on Trials, §§ 43, 118, 120.) The main reason assigned for this rule is that the prisoner has no just cause of complaint if he is tried by twelve qualified and impartial men. "A competent and unbiased juror was selected, sworn," and he "had, therefore, a trial by an impartial jury, which was all" he "could demand." (*Northern Pacific R. R. Co.* v. *Herbert*, 116 U. S., 642, 646; *Southern Pacific Co.* v. *Rauh*, 7 U. S. App., 84, 94.) His own right of peremptory challenge is "not of itself a right to select, but a right to reject jurors." (*Pointer* v. *United States*, 151 U. S., 399, 412.) He cannot complain of an erroneous overruling of his own challenge for cause, provided he could have remedied the error by a peremptory challenge. (*Spies* v. *Illinois*, 123 U. S., 131; *Hopt* v. *Utah*, 120 U. S., 430.) The decisions in the State of New York are to the contrary, but two judges dissented in the leading case of *People* v. *McQuade*, 110 N. Y., 284, and the ruling of this court is in line with the general weight of authority. (Cases cited in note to the McQuade case, 21 Abbott N. C., 458.) "But in truth and according to law there is no necessity nor right that a prisoner shall be tried by particular jurymen, till the prisoner has been given in charge to the jury." (Lord Campbell, C. J., in *Mansell* v. *The Queen*, 8 El. & Bl., 54, 79.) The trial judge may exclude of his own motion, and no exception lies if an impartial jury is obtained. (*United States* v. *Jones*, 69 Fed. Rep., 973, 975–6 & cas. cit.)

Another reason for the rule is given in *People* v. *Murphy*, 45 Cal., 137, 142; namely, that error in excluding a proper juror can not be repaired upon a second trial.

This exception is abandoned in defendants' brief.

II. Defendants' counsel objected to another juror on the ground that "being a government officer and in the government service he is exempt." This objection was overruled, and exception taken (p. 103).

The bill of exceptions does not state what office was held by this witness; nor even does it state as a positive fact that any office at all was held by him. It merely appears that such a claim was made by counsel. This is not sufficient, in the absence of any concession by the

District Attorney, that the claim is founded upon fact. (*Reagan* v. *United States*, 157 U. S., 301, 311; *Charley Smith* v. *Mississippi*, 162 U. S., 592, 600.)

Moreover, exemption is not a ground of challenge. It is a privilege of the juror, which he may waive. (1 Thompson on Trials, § 11; 1 Bishop's New Criminal Procedure, § 926; *United States* v. *Gale*, 109 U. S. 65, 70.) If a government official, not connected in any way with the prosecuting attorney, is willing to serve as a juror, defendant's rights are not prejudiced. This has been held in the case of constables (*Fellows' Case*, 5 Me., 333; *State* v. *Cosgrove*, 16 R. I., 411); and in the case of justices of the peace and deputy sheriffs. (*Owens* v. *State*, 25 Tex. App., 552.) A juror in *Block* v. *State*, 100 Ind., 357, was challenged on the ground that he was deputy prosecuting attorney. The court very properly held that he was under an implied bias; not on account of his relation to the State, but on account of his relation to the prosecuting attorney.

This and the following exception are abandoned in defendants' brief.

III. Defendants claimed that each of them was entitled to three peremptory challenges (p. 103). This is contrary to Rev. St., § 819.

IV–X. These assignments of error are based on various exceptions taken during the examination of the witness, E. D. Seeley (pp. 104–110). The testimony objected to is partly in explanation of the game of policy as played under defendant France's management, and partly in relation to the arrangement of the policy writers' agencies in Cincinnati. They seem to require no comment. It is urged that his testimony is incompetent because the statute does not apply to documents which need expert evidence to interpret them—that the illegal character of the transaction must appear on their face. Lottery tickets, according to defendant's counsel, may be trafficked in without limit if they are in cipher. This argument seems to be sufficiently met by merely stating it.

XI. This assignment of error is a question whether an expert witness may make his testimony clear by means of illustrations upon paper; and whether such illustrations may then be marked in evidence and inspected by the jury. This question was really immaterial to the present case, for the witness's written illustrations added nothing to his testimony. They were cumulative testimony, and simply saved time and trouble in arriving at a clear understanding of it. It is submitted, however, that the papers were entirely competent.

The witness Seeley, a former policy writer and expert in this variety of gambling, having testified (p. 105) as to the method of making bets, was asked by the District Attorney to make one. He did so upon paper, and handed it to counsel, when the following proceedings occurred (p. 111):

Q. This represents a bet, does it?

(Question objected to by counsel for defendants; objection overruled; exception reserved.)

A. Yes, sir.

> Q. Now, Mr. Seeley, I want you to make out a book—a book in which you enter that bet.
>
> (Objected to by counsel for defendants; objection overruled; exception reserved.)
>
> *   *   *   *   *
>
> Q. Mr. Seeley, have you made out the book in which that bet was to be entered?
>
> A. Yes, sir [hands paper to counsel].

Both of these papers were admitted under exception, and were explained by the witness (pp. 111, 112). Their admission is the subject of assignments XI and XXXII, respectively.

These papers were received, not as in themselves relevant to the case, but as explanations by the witness of the kind of game that had been played at Covington. The witness simply put on the paper for greater clearness what he could state, and, indeed, had stated, orally. It was therefore admissible, like a diagram (*State* v. *Lawlor*, 28 Minn., 216, 218; *Ordway* v. *Haynes*, 50 N. H., 159, 164; *Moon* v. *State*, 68 Ga., 687, 695; *Archer* v. *Railroad Co.*, 106 N. Y., 589, 603; *Blair* v. *Inhabitants of Pelham*, 118 Mass., 420; 1 Thompson on Trials, § 870) or a photograph (*Wilson* v. *United States*, 162 U. S., 613, 621, and cas. cit.) or an article upon which a scientific experiment had been made (*Sullivan* v. *Commonwealth*, 93 Pa. St., 284, 296) or the model of a machine in a patent case; and is analogous to an experiment in the presence of the jury. (*Osborne* v. *City of Detroit*, 32 Fed. Rep., 36, 38, *per* Mr. Justice Brown; *People* v. *Hope*, 62 Cal., 291, 295–6; *Leonard* v. *Southern Pacific Co.*, 21 Ore., 555, 564; *Cash Register Co.* v. *Blumenthal*, 85 Mich., 464, 470–1; *Probert* v. *Phipps*, 149 Mass., 258.)

In *People* v. *Jackson*, 111 N. Y., 362, 370, three persons were placed, by directions of the District Attorney, at certain points in a street to represent the situations of the parties when the crime in question was committed. The street was then photographed; and the photograph was held competent testimony in aid of the other testimony in the case.

Upon the same principle, the counsel in summing up the case may "use a map or plan which is not strictly evidence in the case for the purpose of illustrating his argument and explaining to the jury the position which he assumes—just as the teacher makes use of the figures on a blackboard for the purposes of illustration." (1 Thompson on Trials, § 992.)

Judge Thompson, after laying down the rule that diagrams may be referred to and presented to the jury for the purpose of rendering the other testimony more intelligible, quotes as follows from the opinion of Chief Justice Peters in *Shook* v. *Pate*, 50 Ala., 91 (1 Thompson on Trials, § 870):

> A witness may as well speak by a diagram or linear description, when the thing may be so described, as by words. It is a common and usual method of pointing out localities and lines. Even savages resort to it in lieu of words in describing the course of rivers and the line of the seashores. It is enough if it serves the purpose of the witness in the explanation of the lines and localities he is seeking to exhibit.

By the same reasoning, testimony which is in the nature of mental arithmetic may properly be put down on paper.

Whether or not such evidence should be admitted in a given case, is a question addressed to the discretion of the trial court. (*Blair* v. *Inhabitants of Pelham*, 118 Mass., 420; *Hollenbeck* v. *Rowley*, 8 Allen, 473; *Paine* v. *Woods*, 108 Mass., 160, 168; *Barrett* v. *Murphy*, 140 Mass., 133, 143; *Wood* v. *Willard*, 36 Vt., 82, 90; *State* v. *Smith*, 49 Conn., 376, 381.) This belongs to the numerous class of discretionary questions, like the order of proof, the order of challenges to jurors, and the qualification of expert witnesses.

XII–XXIX. These assignments of error relate to the objection that the matters occurring in the presence of the Grand Jury are not competent evidence. It will be remembered that the three carriers—Irvine, Wagner, and Edgar—refused to testify (pp. 152–169). It therefore became necessary to prove by other witnesses that the papers described in the indictment had been taken from them while on their regular routes. This was accordingly done, in the following method: John Heher, a deputy marshal, proved that, on October 4, 1895, he received a subpœna *duces tecum* for the three carriers, directing them to appear before the Grand Jury; that he served Irvine and Edgar with the subpœnas about noon, as they came across the bridge, and Wagner an hour later; that from the time the subpœnas were served until the witness arrived in the Grand Jury room they did not leave his side, did not receive anything from anyone, and did not give anything to anyone or to each other (pp. 247–9). His evidence was in part corroborated by other witnesses (pp. 249–251). Messrs. Carrigan, Tolle, and

Hunter, members of the October Grand Jury, testified that they remembered the three carriers being brought before them; that the carriers had produced certain papers which were concealed about their persons; that they wrote their names upon the papers for identification; and that they also produced certain money (pp. 257–66). Charles T. Greve, Assistant United States District Attorney, corroborated this evidence, and produced certain of the papers, which had been in his possession ever since, and which bore the signatures of the carriers (p. 267). The remaining paper, which was not produced, was a "hit-slip." This had been accompanied with money, had been copied by the witness in the presence of the Grand Jury, and had been thereupon returned with the money to the carrier (p. 268). Mr. Greve produced this copy. It had previously been shown to Wagner, who refused to identify it on the ground that it might incriminate him (p. 165). The original papers so produced are Exhibits G, H, and I (pp. 313–14); and the hit-slip, which is copied at p. 268, is Exhibit D.

The testimony of the Grand Jurors and of the Assistant District Attorney is objected to upon the assumption that occurrences before a Grand Jury are privileged for all purposes, although the oath taken by the Grand Jurors (p. 266) simply binds them to keep them "secret unless you are called upon in a court of justice to make disclosures."

The question was fully discussed by Chief Justice Ruffin in *State* v. *Broughton*, 7 Ire., 96, in a case where Grand Jurors were called to testify to statements of the prisoner made before them, charging another person with the offense. The Chief Justice showed that the law was designed to protect, not the witnesses, but the Grand Jurors themselves; and that, were all persons forbidden to disclose in a court of justice what had occurred before the Grand Jury, there could be no prosecutions for perjury committed there.

It is now well settled that either the Grand Jurors or the prosecuting attorney may testify. (Whart. Crim. Pl. and Pr., §§378, 380; 1 Bish. New Crim. Proc., §857; *People* v. *Reggel*, 8 Utah, 21, 27–8; *People* v. *Young*, 31 Cal., 563; *People* v. *Northey*, 77 Cal., 618, 633; *State* v. *Van Buskirk*, 59 Ind., 384.)

XXX, XXXI. Charles J. Wappenstein, a Cincinnati police detective, testified that in the latter part of April, 1895, he arrested these carriers, Irvine and Wagner, on the Cincinnati end of the suspension bridge, as they were going to Covington, and that he took from them packages of money and slips of paper with numbers on them similar to Exhibit E, that is, policy-writers' "books." Lieut. E. C. Hill, of the Cincinnati police, corroborated this testimony (pp. 269–272). The testimony was objected to and admitted under exception.

Its relevancy is clear. It was important for the purpose of establishing the conspiracy, and connecting the various defendants with it, to show that there was a regular course of business. Much testimony was admitted, whose relevancy is not questioned by the assignments of error, to the effect that at various times during 1895 these carriers were followed and shown to be pursuing regular routes in accordance with some previous understanding. It was thus an important piece of corroborative evidence to show that at other times as well as on October 4 their mysterious movements were for the purpose of connecting the policy-writers of Cincinnati with the headquarters in Covington. It will be remembered, also, that on October 4 they were captured on the return trip from Covington, so that there is no direct evidence as to the cargoes which they had carried on the way over. The testimony clearly indicates that there was some uniform course of business; and this evidence of Wappenstein and Hill confirms the assumption that the course of business was as claimed by the Government.

The extent to which circumstantial evidence is to be admitted is within the discretion of the trial court (*Holmes* v. *Goldsmith*, 147 U. S., 150, 164; *Moore* v. *United States*, 150 U. S., 57; *Thiede* v. *Utah*, 159 U. S., 510., 518); especially in a conspiracy case. (*Clune* v. *United States*, 159 U. S., 590, 592.)

These carriers, although not joined with defendants in the indictment (doubtless for the reason that their assistance was hoped for to prove the case), were members of the conspiracy. All of their acts in pursuance of the conspiracy were therefore relevant and competent. (*Wiborg* v. *United States*, 163 U. S., 632, 657–8; *Kelley* v. *People*, 55 N. Y., 565, 575–6; *United States* v. *Rindskopf*, 6 Biss., 259, 266.) It is not an objection to evidence, otherwise competent and relevant, that it tends to prove another criminal act. (*Moore* v. *United States*, *supra*.)

This case comes properly within the presumption as to the continuance of a course of business. (*Stephen on Evidence*, Art. 13; *Commonwealth* v. *Certain Gaming Implements*, 141 Mass., 114; *Tarbox* v. *State*, 38 Oh. St., 581.)

XXXII. This has already been discussed (XI, *supra*).

XXXIII. This was a motion to compel an election between the different counts of the indictment. The difference in the counts was simply in the statement of the overt acts. The first five counts are based on the transportation by these carriers of the official prints. They vary in that the first three counts charge that the overt acts were under the direction of France and Hollen, the first count referring to both lotteries, the second to the Henry lottery, the third to the Kentucky lottery. The fourth count ascribes the overt act to Hollen alone; the fifth count ascribes it to France alone. The overt act charged in the sixth count is the transportation of the "hit-slip," which was, as the evidence had already shown when the motion to elect was made (p. 275), contemporaneous with the other acts charged, and part of the same transaction.

The motion was addressed to the discretion of the trial court, which discretion seems to have been wisely exercised. (*Pointer* v. *United States*, 151 U. S., 396; *Pierce* v. *United States*, 160 U. S., 355; Abb. Trial Brief Crim. Causes, 183, and cas. cit.; 1 Bish. New Crim. Proc., § 458.)

It is abandoned in defendants' brief.

XXXIV. The error here assigned is "the action of the court in overruling *the motion on behalf of the defendants* that the court direct the jury to acquit *the defendants*" (p. 321). We are unable to find any such motion in the record. At pp. 46–53 are to be found motions by each defendant separately, for his own acquittal. These motions were made at the close of the prosecution's case, and they were thereupon denied after full argument (pp. 275–6). Defendants then introduced testimony in their own behalf, and thus waived their exceptions to the denial of the motions (*Union Pacific R. R. Co.* v. *Daniels*, 152 U. S., 684; *Wilson* v. *Haley Live Stock Co.*, 153 U.S., 39; *Runkle* v. *Burnham*, 153 U. S., 216). The motions were not renewed when the evidence on both sides was closed. Instead, defendants presented a request to charge that they should be acquitted; but this request to charge was based upon the jurisdictional point alone and is the subject of a different assignment of error (p. 312).

A general motion for acquittal, for insufficiency of proof, was made in the case of the defendant Albert L. France alone (p. 330). All of the defendants joined in it, thus practically conceding that there was sufficient evidence as against themselves. It can not be charged that the court erred in not doing what it was not asked to do. If the evidence against any one of the defendants was insufficient, counsel were at liberty to point that fact out to the court by a motion to direct an acquittal. Possibly in such case the court under its undoubted powers could have directed the evidence to be reopened, and the missing link, if it was a case of oversight, supplied. By failing to point out to the court that there was a defect in the testimony as to any particular defendant, counsel waived their right to a direction from the court in the premises; and their remedy was either with the jury or upon a motion for a new trial.

As an exception raises only a question of law, and as the jury passes upon questions of fact, no exception lies to a decision of that body.

Is there any way, then, in which these defendants or any of them can secure a hearing of their claim that there was not enough evidence against them to support a verdict? No such remedy is obtainable under the general principles governing bills of exceptions. (*Allis* v. *United States*, 155 U. S., 117, 122; *Pomeroy's Lessee* v. *Bank of Indiana*, 1 Wall., 592, 602; *Hanna* v. *Maas*, 122 U. S., 24, 26.) Certainly no such point can be urged upon a writ of error in a civil case. If it can be urged here, the reason must be found in the Federal legislation regarding writs of error in criminal cases. The criminal jurisdiction of this court upon writs of error was first given by the act of February 6, 1889, ch. 113, § 6. It was confined to capital cases, and was to be "under such rules and regulations as this court may prescribe." No rules or regulations have ever been prescribed by the court in the premises. The act of March 3, 1891, ch. 417, § 5, which extended this remedy to the case of other infamous crimes, contained no provisions as to the method of procedure. It may perhaps be fairly assumed that the procedure was intended to be the same as that provided for by the prior act. In the absence of formal rules and regulations, counsel are left to infer the new system of procedure from-the decisions of the court under these statutes.

Until recently, the decisions seem to indicate that the writs of error in criminal as in civil cases bring up only defects apparent in the record and questions duly raised by exceptions. (*Holder* v. *United States*, 150 U. S., 91; *Tucker* v. *United States*, 151 U. S., 164; *Rosen* v. *United States*, 161 U. S., 29, 49.) On the last day of the October Term, 1895, however, this court announced that it was not subject to these limitations upon a writ of error in a criminal case, but could notice errors not excepted to; and accordingly reversed a judgment of conviction as against two defendants who had not protected themselves by any exceptions, but as against whom the bill of exceptions contained no incriminating testimony. (*Wiborg* v. *United States*, 163 U. S., 632, 658.) The limitations, if any, of this new practice are as yet undefined. In the case just cited the bill of exceptions not only failed to contain the testimony, if any such was produced upon the trial, tending to incriminate the defendants as to whom the judgment was reversed, but it contained most positive statements on the part of the main defendant, as to whom the judgment was affirmed, to the effect that he alone was responsible for what had been done. It may be that this newly announced rule governing criminal cases in this court goes only to the extent of enabling the verdict of the jury to be reviewed when there is no testimony tending to incriminate the defendant, and when there is positive testimony tending to exculpate him.

If it is necessary in every criminal case to include in every bill of exceptions sufficient incriminating testimony to uphold the verdict as against every defendant, then the method of making up bills of exceptions must be revolutionized, and, instead of instructing District Attorneys that they must be as curt as is consistent with stating the facts bearing upon the exceptions taken on the trial, they must be instructed to insist that the bills of exceptions shall be as full as possible, so as to omit nothing which may be of weight as against the prisoners.

The present bill of exceptions clearly contains every word spoken on the trial. It is submitted, however, that there is ample testimony implicating every defendant except the three who were acquitted. The testimony has been abstracted in the statement of facts. As to some of the defendants, it was comparatively slight, but still sufficient to send the case to the jury within the principles clearly laid down by Chief Justice Church in *People* v. *Bennett*, 49 N. Y., 137, 142–3:

> The distinction referred to, and which I regard as important to be observed, is between questions of law and questions of fact. The former the court may, while the latter they may not, decide. If the prosecution leaves some element necessary to constitute the crime entirely unproved, it is a clear case for the interposition of the court. As in the case of treason, when two witnesses are necessary to an overt act and there is but one, or in perjury when two witnesses are required and but one is produced, and in any case when assuming all the facts proved to be true they fall short of constituting the crime, the prisoner is entitled to have the instruction of

> the court in his favor. But in a case where competent evidence has been given tending to prove every element constituting the crime, and the force and effect which ought to be given to it depends upon the credibility of witnesses and upon inferences to be drawn, as to which persons may differ, it is not the province of the court to take the case from the consideration of the jury, although it may be of the opinion that it is not sufficient to convict.
>
> In cases of weak and unsatisfactory evidence the court can always impress a jury with the benign principles of the common law established for the protection of the innocent; that the prosecution are bound to establish a clear case; that the prisoner is entitled to the benefit of all reasonable doubts; and that it is better that many guilty prisoners should escape than that one innocent person should be punished; and there may be cases so weak upon the facts as to justify the advice of the court that it is unsafe in the particular case to convict. This is the extent to which a court can be justified in going in a case where any view of the facts may be taken warranting a conviction.
>
> Justice is better administered, both in civil and criminal cases, by confining the respective duties of court and jury to each tribunal, and permitting no encroachment by either.

XXXV. This is a single exception to the entire testimony of the witness F. W. King (pp. 185, 289). The motion to exclude it was originally addressed to the discretion of the court, for it had already come in so that it was within the court's discretion to deny a motion to strike out, and leave defendants to take care of it by means of proper requests to charge (1 Thompson on Trials,

§§ 715, 716; *Pontius* v. *People*, 82 N. Y., 339, 347; *Gilmore* v. *Pittsburg R. R. Co.*, 104 Pa. St., 275, 281–2; *McFarland* v. *Bellows*, 49 Mo., 311; *People* v. *Long*, 43 Cal., 444; *Brockett* v. *New Jersey Steamboat Co.*, 18 Fed. Rep., 156; *Wilcox* v. *Stephenson*, 30 Fla., 377, 386; *Gurley* v. *Park*, 135 Ind., 440, 443; *Mo. Pac. Ry. Co.* v. *Lamothe*, 76 Tex., 219, 223). But the testimony had some bearing on the case, as the witness saw defendant France go in sometimes (p. 185) to the room where the printing of the slips was being supervised. Moreover, the exception was to the testimony as a whole, and part of it was relevant as confirming that of other witnesses who located the lottery headquarters at this point, where Edgar was seen to come by this witness, and where he heard the comparing of numbers and saw the lottery slips. (See pp. 169–71, 132, 108, 207, 209, 243, 245; and, as to the slips, pp. 224–5, 242.)

XXXVI. Error is assigned to the court's instructions that the precise date of the offenses charged is not material, and that if the acts charged in the indictment were committed at any time between March 2, 1895, when the Anti-Lottery Act was passed, and the filing of the indictment, then "so far as time is concerned they will be within the reach of the prosecution."

This did not refer to the overt acts. These acts were most clearly proven to have been committed on October 4, 1895, and there never was any doubt on that subject. The indictment, however, charged the conspiracy itself (which, as already shown is the gist of the case) to have been formed on October 4. This involved the possibility of the jury's being misled. A conspiracy, as above shown, is regarded as continued and as being renewed with every overt act. It is therefore proper to give it in the indictment the date of the overt act. The jury might, however, if they were not cautioned by the court, get the idea that they must acquit unless the defendants were shown to have personally participated on that day. Hence it was proper for the court to charge them that this date was immaterial, and that they might convict if they found that the offense of conspiracy bore an earlier date. The court properly started with March 2, 1895, because the Anti-Lottery Act went into effect on that day, and defendants were all from that day chargeable with knowledge of the law (*United States* v. *Realty Co.*, 163 U. S., 427, 438).

Even in other cases than that of conspiracy, however, it is a rule of criminal procedure that the date in the indictment is not material. (1 Bish. New Crim. Proc., § 400; *United States* v. *Le Baron*, 4 Wall., 642, 648; *United States* v. *Matthews*, 68 Fed. Rep., 880, affirmed 161 U. S., 500.)

This exception is abandoned in defendants' brief.

XXXVII. The first paragraph of this assignment seems to require no comment.

The second paragraph contains the following definition of the conspiracy charged in the indictment:

> If the defendants, or two or more of them, did conspire to cause to be carried from Covington, in the State of Kentucky, to Cincinnati, in the State of Ohio, the papers, certificates, and instruments

> described and charged in the indictment, and any one or more of them did any act in Hamilton County, Ohio, to effect the object of the conspiracy, all who were parties to the conspiracy are guilty as charged. To make this more precise and exact it should be, if any one or more of them did any one of the acts charged in the indictment as having been done in the furtherance of the scheme, all the defendants are guilty as charged.

Defendants excepted "to that portion of the charge that defines what a conspiracy may be" (p. 307).

It is difficult to guess what the objection here may be, unless it be to the breadth of the phrase "all the defendants" in the last line. This evidently referred to the words "all who were parties to the conspiracy" in the previous sentence, and the jury can not have been misled; if he thought otherwise, it was the duty of defendants' counsel to make his exception more specific.

XXXVIII. Defendants excepted to "that part of the charge as to what constitutes the offense having been commenced in one State and finished in another, the application of section 731 as to the question of venue; all that portion of the charge" (p. 307).

To sustain this exception this assignment of error sets forth two pages of the charge. While this contains a good deal of unnecessary discussion and digression, the leading proposition laid down by the court is entirely correct, namely, that when "it appears that the conspiracy was begun in another district and completed here, it shall be for the purpose of the case precisely as if it had been both begun and completed here" (p. 296).

It is therefore unnecessary to consider the question whether the exception is sufficiently specific, under *Thiede* v. *Utah*, 159 U. S., 510, and cas. cit.

This and the next exception are abandoned in defendants' brief.

XXXIX. The court cautioned the jury not to be swerved by any sympathy or bias, etc.; and that they had nothing to do with mercy to the prisoners, which was a question for the pardoning power. This belongs to a class of cautionary instructions which are usual and proper. (See 2 Thompson on Trials, § 2456; *Wiborg* v. *United States*, 163 U. S., 632, 656.)

XL. The court charged that if a witness was of notoriously bad reputation for truth and veracity, "it is only common sense that jurors will not be inclined to give to that witness the credit which they would give to a witness of unstained character. But you are not bound to reject his testimony, nor are you bound to accept it. It does not destroy his testimony necessarily; it only goes to his credit or credibility with the jury" (p. 298).

This referred to defendants' attacks on Government witnesses. The instruction conforms to the rule laid down by this court in *Smith* v. *United States*, 161 U. S., 85.

XLI. The court further charged to some extent regarding the weight to be given to statements of interested witnesses. This is clearly proper in a Federal court, and similar comments have been sustained even as to the testimony of the defendants in criminal cases.

(*Johnson, alias Overton*, v. *United States*, 157 U. S., 320, 326; *Wilson* v. *United States*, 162 U. S., 613, 618, 620–1.)

The exception is abandoned in defendants' brief.

XLII, XLIII. These charges seem to be clearly correct in connection with the instructions of the court on p. 293, quoting from Russell on Crimes.

The exception is also insufficient as pointed out under the next assignment.

XLIV. This assignment of error lumps together two entirely independent propositions laid down in the charge (pp. 301–2).

The assignment is based on the following exception (p. 307):

> We reserve an exception to your Honor's refusal to give all the charges as requested, and also to the qualifications by your Honor of the special charges given.

This single exception is made to cover a great number and variety of rulings contained in the instructions beginning with the last paragraph but one on p. 300 and ending with the foot of p. 306. That this exception is insufficient seems hardly to require argument. (*Thiede* v. *Utah*, 159 U. S., 510, 520, 521–2, and cas. cit.; *Worthington* v. *Mason*, 101 U. S., 149; *St. Louis, &c., Ry. Co.* v. *Spencer*, 71 Fed. Rep., 93, 95, and cas. cit. by Sanborn, J.)

These instructions, however, are clearly correct.

The first proposition is that the defendants need not have been in the conspiracy at the outset, and that the act of any conspirator during the continuance of the conspiracy and in furtherance of it is the act of all. This is well settled. (*People* v. *Mather*, 4 Wend., 229, 260–1.) It is for this reason that the acts of any conspirators in furtherance of the conspiracy, and their statements accompanying such acts, are competent evidence against all. (*Wiborg* v. *United States*, 163 U. S., 632, 657.)

The second proposition is that where a conspiracy is proved by circumstantial evidence each piece of evidence might alone be insufficient, while the whole taken together is conclusive as against the defendants. Taking the simile of a cable, the court says: "A single strand might not be sufficient to hold a shallop, but the entire cable might be strong enough to hold a ship" (pp. 301–2). It is proper to use an illustration (*Pointer* v. *United States*, 151 U. S., 396), and this is an elementary statement of the nature of circumstantial evidence. The learned counsel for plaintiff in error claims that the proper illustration would have been the familiar one of a chain "in which each link must be tested separately." The prisoner's counsel claimed the right to an instruction to that effect in *Faust* v. *United States*, 163 U. S., 452, and the value of that illustration was the main question argued in the case, the undersigned maintaining that it was valueless and misleading; and the court did not even refer to it in the opinion.

XLV. This assignment is based on no exception, and seems to be unexceptionable.

XLVI. The court spoke of the head office as being at the corner of 5th and Madison Streets, when, as a matter of fact, it had been removed on June 1, 1895, to the corner of 2nd and Court Streets. This variation is immaterial; nor is the point raised by any exception.

Nor did defendants except to the court's statement, as a fact proved in the case, that the office was under the management of defendants France and Hollen; and such a statement in Federal courts is unexceptionable. (*Wiborg* v. *United States*, 163 U. S., 632, 656.)

XLVII. This assignment of error lumps together about three pages and a half of closely printed matter containing different requests to charge, which were refused by the court. Most of them are long and involved. Hidden between these is one that was clearly correct, namely, that "the failure of any of the defendants to take the stand on his own behalf must not be construed by you in the least degree as evidence of guilt," etc. This seems to have been a trap; and the court fell into it. A specific exception would doubtless have called the court's attention to this, and the charge would have been given. Had it been properly excepted to and still refused, the question would have arisen whether such an instruction is necessary when no comment has been made by the prosecuting officer on defendants' silence (and see p. 300). But we have already pointed out that a specific exception is necessary (XLIV, *supra*); and no case could possibly point out more forcibly the value of this rule of procedure.

XLVIII. The evidence which so clearly connects defendant France with the conspiracy is set forth in the statement of facts, *supra*.

This exception is abandoned in defendants' brief.

XLIX. This seems to require no comment.

L. The motions in arrest of judgment raise the constitutional and jurisdictional questions already fully discussed.

LI, LII. The denial of a motion for a new trial is not assignable as error. (*Clune* v. *United States*, 159 U. S., 590, 591, and cas. cit.)

It does not appear that the court refused to permit defendants to reserve an exception to its action in sentencing certain contumacious witnesses in the presence of the jury. Nor is there any rule of procedure which would prevent the court from so doing.

It is respectfully submitted that the judgment should be affirmed.

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Assistant Attorney General.